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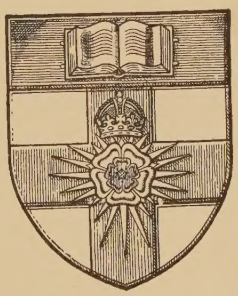

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THE

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1925.

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MEMORANDA.

1925.

Jan. 19. *The dignity of a Baron of the United Kingdom was conferred upon the* Right Hon. Sir Henry Edward Duke, Knight, *President of the Probate, Divorce and Admiralty Division of the High Court of Justice, by the name, style and title of Baron Merrivale, of Walkhampton, in the County of Devon.*

Mar. 17. The Right Hon. Herbert Henry, Earl of Oxford and Asquith, *was appointed to be a Member of the Judicial Committee of the Privy Council, under the provisions of Section* 1 *of the Act* 3 *&* 4 *Will.* 4, *cap.* 41.

May 12. Alexander Dingwall Bateson, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, pursuant to Section* 5 *of the Administration of Justice Act,* 1925, *and was afterwards knighted.*

May 21. The Hon. Mr. Justice Lush *resigned his office of a Justice of His Majesty's High Court of Justice, King's Bench Division.*

May 26. Robert Alderson Wright, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of the Hon. Mr. Justice Lush, resigned, and was afterwards knighted.*

June 25. Sir Charles Montague Lush *was, by His Majesty's Command, appointed a member of His Majesty's Most Honourable Privy Council.*

ERRATUM.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

EDWARDS AND ANOTHER (PAUPERS) . . APPELLANTS; H. L. (E.)*

AND

1924

PORTER . . . . . RESPONDENT. *Oct.* 31.

Husband and Wife—Tort committed by Wife during Coverture—Husband's Liability—Tort connected with Contract—Fraudulent Misrepresentation—Breach of Warranty of Authority—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2.

Notwithstanding the Married Women's Property Act, 1882, which provides that a married woman shall be capable of suing or being sued as if she were a feme sole, a husband is still liable to be sued with his wife for a tort committed by her during coverture, unless the tort is directly connected with a contract with her and is the means of enforcing it.

So *held* by Viscount Finlay, Lord Atkinson and Lord Sumner; Earl of Birkenhead and Viscount Cave dissenting.

Seroka v. *Kattenburg* (1886) 17 Q. B. D. 177 and *Earle* v. *Kingscote* [1900] 2 Ch. 585 approved.

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* *Present:* EARL OF BIRKENHEAD, VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, and LORD SUMNER.

H. L. (E.)
1924
EDWARDS
v.
PORTER.

Opinion of Fletcher Moulton L.J. in *Cuenod* v. *Leslie* [1909] 1 K. B. 880 disapproved.

A married woman, by fraudulently misrepresenting that her husband wanted money to pay rates and do repairs to his house property, induced certain persons to advance a sum of money, which she spent for her own purposes. The husband never authorized his wife to borrow the money or make the representation on his behalf.

In an action by the lenders against the husband and wife for the fraud of the wife:—

Held, that the husband was not liable; by Viscount Finlay, Lord Atkinson and Lord Sumner (applying *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854) 9 Ex. 422 and *Wright* v. *Leonard* (1861) 11 C. B. (N. S.) 258 on the ground that the wife impliedly warranted that she had her husband's authority to borrow the money on his behalf, and therefore the fraud was connected with a contract; by Earl of Birkenhead and Viscount Cave on the ground that the Married Women's Property Act, 1882, had abrogated the common law rule as to the husband's liability for his wife's torts.

Decision of the Court of Appeal [1923] 2 K. B. 538 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Bailhache J. (2)

In August, 1919, the respondent's wife falsely represented to the appellants, Mrs. Edwards and Mrs. Willmore, who had been acquainted with the respondent and his wife for many years, that she had been asked by her husband, as he was in financial difficulties, to request the appellants to lend him moneys for decorative repairs and for the payment of rates and taxes in respect of certain small properties belonging to him in the East End; and that the moneys so lent would be applied to the aforesaid purposes.

The appellants, believing these representations to be true, were induced thereby to hand over to the respondent's wife sums amounting in all to 355*l.*, in order that she should pass the money over to the respondent to be applied by him for the purposes mentioned. The respondent's wife did not hand over any of the moneys to her husband, but misapplied the same to her own purposes.

The appellants sued the respondent and his wife for damages for false and fraudulent representations.

Bailhache J. gave judgment for the appellants against the wife for 355*l.* and costs, to be paid out of her separate

(1) [1923] 2 K. B. 538. (2) [1923] 1 K. B. 268.

estate, and dismissed the action as against the husband, the respondent. On an appeal by the appellants this decision was affirmed by the Court of Appeal by a majority (Bankes and Scrutton L.JJ.; Younger L.J. dissenting).

1924. May 29; June 2. *Wingate Saul K.C.* and *Fior* for the appellants. The Married Women's Property Act, 1882, does not affect the liability of a husband to be sued with his wife for a tort committed by the wife during coverture: *Seroka* v. *Kattenburg* (1); *Earle* v. *Kingscote*. (2) Notwithstanding the observations of Fletcher Moulton L.J. on those two cases in *Cuenod* v. *Leslie* (3) they were correctly decided and should not be overruled. Sub-s. 2 of s. 1 of that Act makes a wife capable of suing or being sued, and says that the husband "need not be joined with her" as a party to the action. The object of those words was to give a plaintiff the option of suing the husband and wife together or of suing the wife alone; it was not intended to relieve the husband from his common law liability for his wife's post-nuptial torts. Sect. 14 expressly limits the husband's liability for his wife's pre-nuptial torts to the extent of the property coming to him through his wife, and if it had been intended to exempt him from liability for his wife's post-nuptial torts that would have been expressly provided for. The words "need not be joined" in sub-s. 2 of s. 1 are not apt for that purpose. Whenever the Legislature has desired to relieve the husband from liability the same language is used—namely, the husband "shall not be liable": Married Women's Property Act, 1882, s. 14; Married Women's Property Act, 1870, s. 12; Matrimonial Causes Act, 1857, s. 26. This point was concluded in the appellants' favour in the Court of Appeal. But the common law rule as to the husband's liability was subject to this exception that, where the tort was intimately connected with a contract with the wife and was the means of effecting it, then, inasmuch as the wife was incapable of binding herself by contract, neither

(1) 17 Q. B. D. 177. (2) [1900] 2 Ch. 585.
(3) [1909] 1 K. B. 880.

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she nor her husband could be sued for the tort: *Liverpool Adelphi Loan Association* v. *Fairhurst.* (1) A similar exception applied in the case of infants. As to the origin of this exception see *Johnson* v. *Pye* (2) and *Cooper* v. *Witham.* (3) It has been held that this exception to the husband's liability is not affected by the Married Women's Property Act, 1882, and the majority of the Court of Appeal have held that it applies to the present case. But here there was no contract with the wife at all; it was simply a naked fraud on her part. It is said, however, that her fraudulent misrepresentation amounted to a warranty that she had authority to make the loan on her husband's behalf and that therefore the exception applies. But the principle of *Collen* v. *Wright* (4), which evolved this contract of warranty—described by Younger L.J. as a legal fiction to enable the Court to do justice where fraud was absent—has never been applied to a case of fraud except in *Wright* v. *Leonard* (5), and there there was a difference of opinion. [On this point they referred to *Jenkins* v. *Hutchinson* (6); *Lewis* v. *Nicholson* (7); *Starkey* v. *Bank of England* (8); *Firbank's Executors* v. *Humphreys* (9); *Heilbut, Symons & Co.* v. *Buckleton.* (10)] The law is correctly stated by Collins L.J. in *Earle* v. *Kingscote* (11), where he says that the exception does not apply to a case in which the real substance and gist of the matter is in fact a tort, though by ingenuity it might be framed into a statement of a contract. That decision completely covers this case. The test is, Is the substance of the action tort or contract?

Thorn Drury K.C. and *Doughty* for the respondent. It is not correct to say that at common law the husband was liable for his wife's torts. He was joined as a defendant to the action for conformity because the wife could neither sue nor be sued alone, and, seeing that all her personal property

(1) 9 Ex. 422.
(2) (1665) 1 Sid. 258.
(3) (1668) 1 Lev. 247.
(4) (1857) 7 E. & B. 301; 8 E. & B. 647.
(5) 11 C. B. (N. S.) 258.
(6) (1849) 13 Q. B. 744.
(7) (1852) 18 Q. B. 503, 515.
(8) [1903] A. C. 114, 118.
(9) (1886) 18 Q. B. D. 54, 62.
(10) [1913] A. C. 30, 49.
(11) [1900] 2 Ch. 585, 592.

was vested in the husband, an action against the wife alone would be fruitless, and the husband had to pay the damages. Where, however, a decree of divorce had been granted the husband could not be sued for a tort committed by the wife during the coverture. The woman, being no longer under coverture, was capable of suing and being sued, and the necessity for joining the husband ceased to exist. So if the husband died the action went on against the wife; but if the wife died the action abated. *Capel* v. *Powell* (1); *In re Beauchamp* (2); *McNeall* v. *Hawes*. (3) Accordingly, since the passing of the Married Women's Property Act, 1882, which provides that a married woman shall be capable of suing or being sued either in contract or in tort as if she were a feme sole, the reason for the old common law rule has disappeared and the rule disappears also. The words "need not be joined" in sub-s. 2 of s. 1 are accounted for by the fact that the only necessity for joining the husband was abolished by the terms of the sub-section itself. The provision in the same sub-section that the damages and costs recoverable against the wife in any such action "shall be payable out of her separate property and not otherwise" also shows that the husband was not intended to be liable. *Seroka* v. *Kattenburg* (4) and *Earle* v. *Kingscote* (5) have been continuously criticised, and the High Court of Australia, in construing an identical provision in the Queensland Married Women's Property Act, has declined to follow those decisions: *Brown* v. *Holloway*. (6) Those cases were wrongly decided, and ought to be overruled for the reasons stated by Fletcher Moulton L.J. in *Cuenod* v. *Leslie*. (7) In the present proceedings (8) Scrutton L.J. regretted that the Court was bound to decide the case "on reasons quite remote from actuality." Assuming that the common law liability of the husband still continues, this case falls within the exception to the rule. As a married woman could not at common law enter into a

(1) (1864) 17 C. B. (N. S.) 743, 748.
(2) [1904] 1 K. B. 572, 581.
(3) [1923] 1 K. B. 273, 278.
(4) 17 Q. B. D. 177.
(5) [1900] 2 Ch. 585.
(6) (1909) 10 C. L. R. 89.
(7) [1909] 1 K. B. 880.
(8) [1923] 2 K. B. 553.

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contract, it was held that, if she committed a fraud in the course of the negotiations for what would have been a contract if she had the power of contracting, the person who had been cheated by her into making the contract was not allowed to disregard the contract and sue her for the tort; otherwise the wife would lose the protection which the law gave her against contracts made by her during coverture. Accordingly the liability of a husband for fraudulent misrepresentations made by his wife does not extend to a case in which the fraud of the wife is directly connected with a contract with the wife and is the means of effecting it. Here the wife could have been sued for breach of warranty of authority, and there was consequently a contractual relationship between her and the appellants. A pure and naked tort, to use the language of the decisions, is one in which damages cannot be recovered in contract. *Earle* v. *Kingscote* (1) is distinguishable on this point, because in that case the fraud had nothing whatever to do with the contract.

Wingate Saul K.C. replied.

The House took time for consideration.

1924. Oct. 31. EARL OF BIRKENHEAD (read by VISCOUNT CAVE). My Lords, I am of opinion that this appeal fails, and I should have moved your Lordships in this sense had I not become aware that such a motion would not succeed. It had been my intention to prepare a statement of the grounds which have led me to this conclusion. But I have had the pleasure and advantage of reading the judgment of my noble and learned friend Lord Cave. That judgment so exactly expresses my own point of view that I do not think it proper to take up your Lordships' time by reading a separate opinion.

I wish, however, to make it plain by particular mention, that I, like Lord Cave, believe that *Seroka* v. *Kattenburg* (2) was wrongly decided. I think that the powerful and subtle reasoning of Fletcher Moulton L.J. in *Cuenod* v. *Leslie* (3) is unanswerable: it has at least never been answered; not even in these proceedings.

(1) [1909] 2 Ch. 585. (2) 17 Q. B. D. 177.
(3) [1909] 1 K. B. 880.

VISCOUNT CAVE. My Lords, the wife of the respondent represented to the appellants that she was authorized by her husband to borrow money on his behalf, and on the faith of that representation obtained from the appellants loans amounting to 355*l*. She had in fact no such authority, and used the borrowed moneys for her own purposes. The appellants sued the respondent and his wife for damages for the false representation made by the wife. The action was heard by Bailhache J., who gave judgment against the wife for 355*l*., to be payable out of her separate property, but dismissed the action as against the respondent. An appeal against the latter decision was dismissed by the Court of Appeal, Younger L.J. dissenting; and thereupon the present appeal was brought.

Upon the argument of the appeal before your Lordships two questions were discussed—namely, first, whether notwithstanding the Married Women's Property Act, 1882, the old common law rule under which a husband could be sued with his wife for damages for her post-nuptial torts still holds good; and secondly, if so, whether the exception to that rule, which laid it down that where the tort was so connected with a contract as to be part of the same transaction neither the wife nor the husband could be made responsible for it, is still operative and covers this case. The first question had been decided in the affirmative in *Seroka* v. *Kattenburg* (1); and in *Earle* v. *Kingscote* (2) that decision had been approved and followed by the Court of Appeal, Rigby L.J. doubting. The decision had since been questioned by Fletcher Moulton L.J. in *Cuenod* v. *Leslie* (3); and in *Brown* v. *Holloway* (4) the High Court of Australia had declined to follow it. But in the present case the Court of Appeal held the decision in *Earle* v. *Kingscote* (2) to be binding upon them, though it would appear from the judgment of Scrutton L.J. that he followed it with reluctance; and accordingly it was on the second ground only that the majority of the Court held the respondent not liable.

(1) 17 Q. B. D. 177.
(2) [1900] 2 Ch. 585.
(3) [1909] 1 K. B. 880.
(4) 10 C. L. R. 89.

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Both points are open for the decision of your Lordships' House.

In dealing with the first question it is desirable to have clearly in mind the nature and origin of the common law rule which existed before the Act of 1882. As to the rule itself there is no question. Before the passing of the Act a wrong committed by a married woman during her coverture was (speaking generally) ground for an action against her for damages; and in such an action it was held necessary and proper to join her husband as a defendant, and judgment was given against both. But as to the origin of the rule the cases are not altogether in accord. In *Wainford* v. *Heyl* (1) Jessel M.R. said that a married woman "is not liable for general torts, but her husband is liable"; and he added: "Strictly speaking she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability." But with all respect to that great judge this cannot be the true view, as it is plain that an action against husband and wife for the wife's tort abated on the death of the wife or the dissolution of the marriage: *Capel* v. *Powell* (2); and this would not have been the case if the husband had been personally liable for the tort as for his own wrong. In *Scott* v. *Morley* (3) Lord Esher M.R. said that "if a wife during marriage committed certain torts she could be sued in respect of them jointly with her husband; she could be sued on the ground that she had committed the wrong, and he on the ground that he had permitted her to do so"; but this also seems to be inaccurate, as a husband could be sued for a wrong committed by his wife while she was living apart from him and no question of permission could arise: *Head* v. *Briscoe*. (4) Nor is it quite a sufficient explanation to say that, as all the wife's personal property vested in her husband, it was just that he should bear the liability for her wrong actions. This circumstance may well have tended to the maintenance of the rule in question; but it was not

(1) (1875) L. R. 20 Eq. 321, 324.
(2) 17 C. B. (N. S.) 743.
(3) (1887) 20 Q. B. D. 120, 124.
(4) (1833) 5 C. & P. 484.

(as a matter of history) the true foundation of the rule, and in fact the rule applied even where the wife had brought nothing to her husband. I think that when the older authorities are examined it becomes clear that the true explanation of the rule is to be found in that legal unity between husband and wife which existed when the rule was formulated, and which in those days rendered it inconceivable to a lawyer that a married woman should sue or be sued alone. It is in this sense that in the early cases, such as *Drury* v. *Dennis* (1), it is said that the husband is joined "for conformity only"; and in *Capel* v. *Powell* (2) Erle C.J. stated the rule as follows: "During coverture the wife has no such existence as to enable her to be a suitor in her own right in any court; neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her; neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband, it would be idle to sue the wife alone; the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife; but, if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant." There are many other authorities to the same effect; and the law is so stated in the text-books, such as Lush on Husband and Wife (3rd ed., p. 327) and Clerk and Lindsell on Torts (7th ed., p. 46).

If this is so, then what is the effect on the rule in question of the Married Women's Property Act of 1882? Sect. 1, sub-s. 2, of that Act is as follows: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme

(1) (1608) Yelv. 106. (2) 17 C. B. (N. S.) 748.

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sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Taking first the provision that "a married woman shall be capable . . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole," it is evident that this enactment removes the sole ground on which it had been held necessary and proper in an action against a married woman for a wrong committed by her during the coverture to join her husband as a co-defendant. He was joined as a defendant only by reason of the "universal rule" that a wife could not be sued alone; but this "universal rule" has now been abrogated, for it has been enacted that she can be sued alone "as if she were a feme sole." The whole reason and justification for joining a husband in an action against his wife for her post-nuptial tort has therefore disappeared; and it would seem to follow, upon the principle "cessante ratione cessat lex," that he is no longer a necessary or proper party to such an action.

An argument to the contrary has been founded upon the succeeding words of the sub-section, "and her husband need not be joined with her as plaintiff or defendant," etc.; for it is said that the enactment that the husband "need not be joined" gives an option to the person injured to join him or not, as he thinks fit: per Mathew J. in *Seroka* v. *Kattenburg* (1); cf. *Earle* v. *Kingscote*. (2) But the answer to this argument was given by Fletcher Moulton L.J. in the following passage of his judgment in *Cuenod* v. *Leslie* (3): "My own personal view is that this language is very carefully chosen. The draftsman was perfectly aware of the status of a

(1) 17 Q. B. D. 179. (2) [1900] 2 Ch. 589, 591.
(3) [1909] 1 K. B. 888.

husband in respect of a wife's torts. He knew that the Courts had permitted him to be joined in an action brought upon a cause of action with regard to which he had no personal liability only because they were obliged to do so, since the wife could not be sued alone. He might be joined only because he must be. The draftsman therefore felt that the correct mode of putting an end to the anomaly was to remove the necessity which alone had led to it. If this necessity for the presence of the husband no longer existed, why should the Courts permit a man to be made defendant in an action in respect of matters for which he was not liable, and where his presence was not required ? "

To this it may be added that Fletcher Moulton L.J. did not say, nor do I think that it can be justly said, that the enactment that the husband " need not " be joined can be read as being itself an enactment that he " shall not " be joined as a defendant. That would be an illegitimate extension of words which are clear ; and, indeed, there was good reason for not using the latter expression, for it might have been held to prevent a husband and wife who had suffered a joint tort from suing together for damages and to make it illegal for a person who had suffered a wrong from husband and wife jointly to sue them in one action. The argument up to this point is, not that the statute has said in terms that the husband shall not be joined as a defendant, but that it has removed the sole ground for joining him in a case where the wife alone has committed a wrong ; and the addition of a provision, which would in any case be implied from the preceding words, that he need not be joined as a defendant in such an action, does not cut down but rather strengthens the inference to be drawn from the preceding words.

But the statute does not stop there ; and it appears to me that a later provision of the sub-section, to which Fletcher Moulton L.J. also called attention—namely, the provision that " any damages recovered against her in such action or proceeding shall be payable out of her separate property, and not otherwise "—has a bearing on the question which

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I am now discussing. By this I do not mean that the words "and not otherwise" mean "and not out of her husband's estate"; for in any case it is clear that a judgment recovered against a wife could not as such be enforced against her husband. The argument to be founded upon the provision under discussion is quite different—namely, that its effect is entirely to change the nature and effect of proceedings against a married woman for her wrong action and so to dispense with all reason or excuse for adding her husband as a defendant. Under the former law, the remedy against a married woman for her tort was a personal action for damages; and the judgment for such damages when obtained could be enforced against her by the usual methods of execution, including arrest with her husband under a capias: *Newton* v. *Boodle*. (1) It is true that she was usually discharged from arrest if she had no separate property wherewith to satisfy the judgment; but this was a matter of indulgence and not of right: *Edwards* v. *Martyn* (2); *Ivens* v. *Butler* (3); and it was held that the judgment creditor had no direct right to resort to her separate estate for payment: *Wainford* v. *Heyl*. (4) But the Act of 1882 has changed all this. By s. 1, sub-s. 2, of that Act it is enacted that any damages recovered against a married woman in any action taken against her shall be payable out of her separate property and not otherwise; and it was held by the Court of Appeal in *Scott* v. *Morley* (5) that the effect of this enactment is to relieve the married woman from the personal liability to satisfy a judgment which existed under the old law, and to impose upon her a new liability—referred to by Bowen L.J. as a "proprietary liability"—which cannot be enforced by a personal proceeding, such as arrest under the Debtors Act, but only by execution upon her separate estate. This change appears to me completely to alter the nature and effect of an action against a married woman for her tort, and to convert such

(1) (1847) 9 Q. B. 948.
(2) (1851) 17 Q. B. 693.
(3) (1857) 7 E. & B. 159.
(4) L. R. 20 Eq. 321.
(5) 20 Q. B. D. 120.

an action from a personal action into a proceeding for obtaining satisfaction out of her separate estate; and I am unable to conceive any legal reason why to such a proceeding her husband should be made a party. In short, the previously existing legal unity between husband and wife has been dissolved, and with it has gone the whole foundation for the old rule as to the husband's liability.

An argument in support of the continuation of the old rule has been founded on s. 14 of the Act, which provides that a husband shall be liable for his wife's ante-nuptial contracts and torts to the extent of property which he has acquired from and through her and not further or otherwise; for it is said that, as the Act deals expressly with the liability of a husband for his wife's ante-nuptial torts and contains no section expressly relieving him from liability for wrongs done by her after her marriage, the inference is that his liability for the latter was intended to remain unaltered: per Smith J. in *Seroka* v. *Kattenburg* (1), and cf. *Earle* v. *Kingscote*, per Lord Alverstone M.R. (2) This argument has force, but it does not appear to me to be convincing. It must be remembered that before the Act of 1882 the position of a husband and wife in respect of the wife's ante-nuptial torts was different from their position in respect of her post-nuptial torts. Under the Married Women's Property Act, 1874, a husband was liable in damages for his wife's ante-nuptial torts to the extent only of certain specified assets accruing to him through his wife, and it is this qualified liability which is reproduced, subject to certain modifications, in the amending and consolidating Act of 1882. In these circumstances it is not surprising that the provisions of ss. 13 to 15 of the Act of 1882 were confined to a wife's ante-nuptial torts, and were not applied to her torts committed during coverture. On the other hand, it is noticeable that, while s. 13 provides that as between a wife and her husband her separate property shall be primarily liable for her ante-nuptial wrongs, the Act contains no similar provision as to her post-nuptial wrongs; and yet if it had been intended that the husband should

(1) 17 Q. B. D. 180. (2) [1900] 2 Ch. 590.

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continue to be responsible for wrongs of the latter class, such a provision would surely have been inserted.

It remains to notice an observation made by Mathew J. in *Seroka* v. *Kattenburg* (1), that, if the Act of 1882 is to be construed as altering the law in the above respect, it is an Act for the relief of husbands and not an Act affecting the property of married women. I am unable to follow that observation. The effect of ss. 2 and 5 of the Act of 1882 is to deprive a husband of all his interest jure mariti in his wife's property and earnings, and so in many cases to intercept the funds by means of which he could have satisfied a claim for his wife's wrongdoing; and this being so, it was surely not unreasonable that the Act should at the same time relieve him from liability for that wrongdoing, especially as the same Act gives to the person injured a new and direct remedy against the wife's separate property in her hands. The effect of such a provision is not to turn the Act into a measure for the relief of husbands, but only to save a husband from the hard fate of having to continue to bear a burden when he is being relieved of the means which would have assisted him to bear it. If in this case your Lordships should hold that on the true construction of the Act of 1882 this injustice has been committed, then the sooner it is remedied by further legislation the better.

For these reasons I am of opinion that *Seroka* v. *Kattenburg* (2) was wrongly decided and should be overruled, and that the appeal fails on that ground.

My Lords, if I am right in my conclusion upon the first point, the second question does not arise; for if the old rule as to the responsibility of a husband for his wife's wrongs is gone, any exception to that rule becomes immaterial. But as upon the first point your Lordships may take a different view, it is desirable that I should deal with the second question also.

My Lords, the origin and nature of the exception in question clearly appears from the authorities. It had long been settled that as an infant could not bind himself by a contract, he

(1) 17 Q. B. D. 179. (2) 17 Q. B. D. 177.

could not be sued for a tort which was so connected with his contract as to be part of the same transaction: *Johnson* v. *Pye* (1); for if that were allowed, the infant would in substance be made responsible upon his contract, and "all the infants in England would be ruined": 1 Sid. 129; cf. *Jennings* v. *Rundall*. (2) In *Liverpool Adelphi Loan Association* v. *Fairhurst* (3) the same principle was applied to a married woman; and it was held that, as a married woman was incapable of binding herself by a contract, neither she nor (consequently) her husband could be sued for a tort which was immediately connected with a contract entered into by her: see also *Wright* v. *Leonard*. (4) Upon the question whether in the present case the tort committed by the respondent's wife in falsely and fraudulently representing that she was authorized by her husband to borrow money on his behalf was so immediately connected with the warranty of authority which was implied in that representation as to fall within the doctrine of *Fairhurst's* case (3), the Court of Appeal was not unanimous; and if it were necessary to determine that point, I should desire to consider very carefully the forcible reasoning to the contrary of Collins L.J. in *Earle* v. *Kingscote* (5) and of Younger L.J. in the present case. But it is unnecessary for me to trouble your Lordships with a discussion of that question; for even if it be assumed that under the law as it existed before the Act of 1882 neither the respondent's wife nor her husband could have been sued for her fraud, it appears to me that there is great difficulty in applying the same doctrine to a case arising after the passing of the Act. The principle of *Fairhurst's* case (3) was that, as a married woman could not bind herself by a contract, she could not be sued for a tort which was so connected with a contract as to be part of the same transaction; and it was because she could not be sued that her husband could not be sued either. But it has now been enacted by s. 1, sub-s. 2, of the Act that a married woman shall be capable of rendering

(1) 1 Sid. 258.
(2) (1799) 8 T. R. 335.
(3) 9 Ex. 422.
(4) 11 C. B. (N. S.) 258.
(5) [1900] 2 Ch. 591.

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herself liable on a contract, though only to the extent of her separate property, and also that she may be sued in tort in all respects as if she were a feme sole ; and no exception is made by the statute in respect of a tort connected with a contract. Thus the Act has removed both the ground for the exception made in *Fairhurst's* case (1) and the exception itself ; and I fail to see how consistently with the Act the exception can now be applied in any case. Indeed, if *Fairhurst's* case (1) is still law, it would appear that judgment should not have been given against the respondent's wife ; for that case laid it down, not only that a husband could not be sued for his wife's tort connected with a contract, but that the wife could not be sued either. Of course the judgment was rightly given under the Act, but this shows that the Act has abrogated the previous law.

Upon the whole matter I think the true view is that both the rule as to a husband's general responsibility for his wife's post-nuptial torts and the exception to that rule laid down in *Fairhurst's* case (1) and *Wright* v. *Leonard* (2) have been swept away by the Act ; and accordingly I am of opinion that this appeal fails on the first ground and should be dismissed.

VISCOUNT FINLAY. My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of Bailhache J. The action was brought by the appellants as plaintiffs against F. H. Porter, the respondent, and his wife to recover various sums of money amounting in all to 355*l.* under the following circumstances. The wife of the defendant represented to the plaintiffs in 1919 that her husband, F. H. Porter, required money to effect repairs to his house property and for the payment of rates, and that she wanted to borrow the money for the purpose on behalf of her husband. She induced the plaintiff, Mrs. Edwards, to advance 175*l.* and the plaintiff, Mrs. Willmore, to advance 180*l.* to her, for the use of her husband. The wife of the respondent used the whole of these sums for her own purposes, and no part of

(1) 9 Ex. 422. (2) 11 C. B. (N. S.) 258.

them ever reached the respondent, F. H. Porter. His wife had no authority from him to borrow these moneys.

The case came before Bailhache J., who gave judgment in favour of the plaintiffs against the respondent's wife and dismissed the claim as against the respondent himself. His decision was affirmed in the Court of Appeal by Bankes and Scrutton L.JJ.; Younger L.J. dissenting.

The plaintiffs' case against the husband is that the money was obtained by the fraud of his wife and that the plaintiffs are entitled to sue the wife to recover it, joining the husband for conformity, as in the case of any tort committed by a married woman while under coverture.

There is no doubt whatever that the money was obtained by the fraud of the wife.

The first objection raised for the respondent was that he could not be joined for conformity in consequence of the second sub-section of section 1 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). That sub-section provides that a married woman shall be capable of binding herself to the extent of her separate property and of suing or being sued either in contract or in tort as if she were a feme sole, and that her husband need not be joined with her as plaintiff or defendant, "and any damages or costs recovered against her by any such action or proceeding shall be payable out of her separate property, and not otherwise." It was urged that the effect of this enactment was to put an end to the power which existed at common law of joining the husband for conformity in an action against a married woman for tort and the consequent power of enforcing the judgment against him by execution within the limits prescribed by law in the case of a husband so joined for conformity.

In my opinion this objection cannot prevail. I agree with the conclusion reached in *Seroka* v. *Kattenburg* (1) by Mathew and A. L. Smith JJ., that this enactment, while it gives the power of suing the wife alone, does not relieve the husband from his common law liability. The words are enabling, and

(1) 17 Q. B. D. 177.

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there are no words to relieve the husband from his liability if joined for conformity in an action against the wife.

The same view was taken in *Earle* v. *Kingscote* (1) in the Court of Appeal before Lord Alverstone M.R., Rigby and Collins L.JJ. The authorities were reviewed by Collins L.J. in a singularly lucid judgment, and the Court of Appeal held that the enactment does not mean that the husband shall not be joined, but merely that it is not necessary to join him if the plaintiff seeks satisfaction out of the wife's separate estate.

Great reliance was placed by the respondent on the words in the sub-section which provide for the payment of damages and costs out of the separate property of the wife and not otherwise. It is, however, clear that this provision refers only to proceedings under the section against the wife alone for the purpose of making her separate estate liable. If the plaintiff prefers to sue as at common law, he has the same rights as before the statute was passed.

Fletcher Moulton L.J. expressed a different opinion on this point in *Cuenod* v. *Leslie* (2), but in spite of the powerful and acute criticism to which he subjected the provisions of the sub-section, I feel myself unable to agree with his conclusion, as it seems to me to be in conflict with the language of the enactment. What the Lord Justice said must command great attention if the question ever arises whether there should be legislation upon the point.

The second point made on behalf of the respondent depends upon totally different considerations. It turns upon the law laid down in the case of *Liverpool Adelphi Loan Association* v. *Fairhurst.* (3) In that case it was decided by a very strong Court (Pollock C.B., Parke, Alderson and Martin BB.) that while a married woman is responsible for frauds committed by her during coverture, the husband being joined as defendant, yet, when the fraud is connected directly with a contract with the wife and was the means of effecting it and parcel of the same transaction, the wife cannot be responsible nor can

(1) [1900] 2 Ch. 585. (2) [1909] 1 K. B. 880, 886–889.
(3) 9 Ex. 422, 427, 429, 430.

the husband be joined with her. During the argument Alderson B. said: "It seems to me that the torts of the wife, for which the husband is to be considered as responsible, are those only which are purely torts, that is to say, such as are in no way connected with a contract," and Parke B. added: "In *Jennings* v. *Rundall* (1) it was held that a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant." In delivering the judgment of the Court, Pollock C.B. says: "A feme covert is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is not a contract of any kind which a feme covert could make, whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue"; and he added at the end of the judgment: "In the case of an infant, it was held, for a similar reason, that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him: *Johnson* v. *Pye* (2); and in the latter report it was said, that if the action should be maintainable, all the pleas of infancy would be taken away, *for such affirmations are in every contract.*"

It appears to me that the fraud here was most intimately connected with the contract. The wife borrowed the money as for her husband, and this of itself would involve a

(1) 8 T. R. 335. (2) 1 Sid. 258; 1 Keb. 913.

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representation that she had his authority to borrow it. Moreover, she expressly stated that it was her husband who required the money for certain purposes which she specified. The present case appears to me to fall directly within the principle laid down in the *Liverpool Adelphi* case (1) in 1854. The authority of that decision is in no way qualified by the decision in *Wright* v. *Leonard* (2), in which the Court was equally divided upon the question whether on the facts of that particular case it fell within the principle which had been laid down by the Court of Exchequer in 1854. The case was decided upon demurrer. The declaration alleged that one Salt, being possessed of certain bills of exchange which purported to be accepted by Leonard, applied to the plaintiffs to discount the bills for him and that Elizabeth, the female defendant, to induce the plaintiffs to discount the bills, falsely and fraudulently asserted that they were in truth the acceptances of Leonard, her husband, and that the plaintiffs, in reliance on the said representation, discounted the bills, paying to Salt 500*l.* for them, and that the acceptances were not by Leonard. To this it was pleaded by the fourth plea that Elizabeth, at the time of the representation, was the wife of the defendant Daniel. To this plea there was a demurrer on the ground "that a married woman who makes a false and fraudulent representation as in the declaration mentioned, is liable in damages for the same."

The Court was equally divided. Byles J. and Erle C.J. were of opinion that the representation was in the nature of a warranty of a debt and that judgment should be entered for the defendants; on the other hand, Willes and Williams JJ. thought, in my opinion rightly, that there should be judgment for the plaintiffs. Their reasons are stated in the joint judgment of Willes and Williams JJ.: "The present case falls within that general rule, there having been, if the declaration truly states the facts, no contract with the wife. In the event of her evidence shewing a contract in the course of entering into which the alleged misrepresentation was made, the question will then arise upon the facts, under the general

(1) 9 Ex. 422. (2) 11 C. B. (N. S.) 258, 267.

issue, whether such a fraud is shewn as falls within the rule or the exception. For the present, seeing that liability for a naked fraud, not accompanying a contract, is in question, we think there should be judgment for the plaintiffs." It will be observed that this case recognizes the principle laid down in the *Liverpool Adelphi* case (1), and that the difference of opinion was simply on the question whether on the allegations in the declaration the case fell within it or not.

In the case now before the House it appears to me that there can be no doubt that it falls within the rule stated in the *Liverpool* case. (1) Here the wife got the money for herself by means of the representation, both express and implied, that she was borrowing for her husband. The fraud was directly connected with the contract and was the means of effecting it, the whole thing being one and the same transaction.

For these reasons I agree with Bailhache J. and the majority of the Court of Appeal in their conclusion that the husband is not liable.

LORD ATKINSON. My Lords, the facts of this case have been fully stated by the noble Lords who have preceded me. I need not repeat them at any length. In some of the numerous authorities which have been cited in argument, it would seem to have been considered that in order that a husband should escape liability for his wife's post-nuptial torts, it was necessary that the contract with which this tort should be connected was of a somewhat formal character. I do not think it is at all necessary for this end that the contract should be of that kind. In the case of *Collen* v. *Wright* (2) that distinguished and learned judge, Wightman J., states the law as to warranty of agency, in a very short passage, in clear and simple language. He said : " If a man makes a contract as agent he does promise that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to the representation."

(1) 9 Ex. 422.
(2) 7 E. & B. 301, 313 ; on appeal 8 E. & B. 647, 657.

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The promise by the agent that he is what he represents himself to be, accepted and confided in by the person to whom it is addressed, constitutes, according to this statement of the law, the implied contract of warranty of authority. When this case went to the Exchequer Chamber Willes J., when delivering the judgment of the Court, concurred in by Pollock C.B., Williams J., Bramwell, Watson and Channell BB., laid down the law in terms similar to those used by Wightman J.

The principle thus laid down applies with equal force to cases where the representation of the agent is false to his knowledge, though not fraudulent, and where it is both false and fraudulent. In *Polhill* v. *Walter* (1) a bill was presented at the office of a drawer who was absent. A., who lived in the house with the latter person, on being assured that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawer, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due. The indorsee, having first ineffectually sued the drawer, sued A. for falsely, fraudulently and deceitfully representing that he was authorized to accept the bill by procuration. On the trial the jury negatived all fraud in fact. It was held that, notwithstanding this finding, A. was liable on the ground that the making of a representation which a party knows to be untrue, and which is intended, or is calculated from the mode in which it is made, to induce another to act on the faith of it, is a fraud at law, and that A. must be considered to have made such a representation to all who received the bill in the course of its circulation. This decision was approved of by Lord Herschell in *Derry* v. *Peek*. (2) Buckley L.J., in *Yonge* v. *Toynbee* (3), sums up the result of the authorities in these words: "The result of these judgments, in my opinion, is that the liability of the person who professes to act as agent arises (*a*) if he has been fraudulent, (*b*) if he has without fraud untruly represented that he had authority when he had not, and (*c*) also

(1) (1832) 3 B. & Ad. 114. (2) (1889) 14 App. Cas. 337, 366.
(3) [1910] 1 K. B. 215, 227.

where he innocently represents that he had authority where the fact is either (1.) that he never had authority or (2.) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge." This last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and that it is immaterial whether he knew of the defect or not. In *Lewis* v. *Nicholson* (1) Lord Campbell in giving judgment said that the agent "is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not." So that if the agent falsely and fraudulently represents that he has authority to act as agent, the person to whom the representation is made and who, trusting it, acts upon it to his damage, may elect whether he will sue the agent in an action for deceit, or will sue him on an implied contract that he had the authority he pretended to have.

When, as in the present case, the negotiations, representations and arrangements culminating in a fraud really form only one transaction, it is extremely difficult, it may be quite impossible, to fix the sequence in point of time of the several items of which the fraud is composed. Bailhache J.'s notes of the evidence given in the present case are not very full, but they represent that Mrs. Edwards stated that on September 1, 1919, she went with her sister, Mrs. Wilmore, to see Mrs. Porter; that Mrs. Porter was talking about rates and taxes and his (i.e., her husband's) inability to pay them, and asked if we could lend money; said that the property was at Poplar and wanted doing up. She said Mr. Porter had asked her to ask us if we had the money. She showed me 51*l.* that she said her son-in-law had given P. (i.e., her husband) to have the property repaired. I lent her 140*l.* next day.

Bailhache J. in giving judgment, naturally from his recollection of the evidence given before him, aided, no doubt, by those notes, describes in the following words what occurred.

(1) 18 Q. B. 503, 511.

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He says: "The action was brought in respect of sums, considerable sums so far as the plaintiff was concerned, which were handed over to Mrs. Porter, who induced the plaintiff to lend her money by falsely representing that she was borrowing the money not for herself but for her husband, and that her husband wanted the money to repair some small property which he had." This was all untrue. That is what her evidence, I think, means and amounts to. She states that her husband asked her (his wife) to ask if the plaintiff had the money, meaning thereby, as the earlier passage shows, the money to lend. In other words, she said that she was his authorized agent to procure the loan. It appears to me clear that if Mrs. Porter were a feme sole the appellants could on the authorities have sued her for damages for breach of her implied contract.

In my view, therefore, on the facts of this case, it is clear that the tort of which Mrs. Porter was guilty was not merely directly connected with her contract that she had authority as agent of her husband to contract the loan, but that the tort was the means adopted by her to effect that contract, and was a part of the single transaction. Bailhache J. did not discuss in his judgment the bearing of the Married Women's Property Act of 1882 on this case. He decided, however, to use his own words, that "There must be a judgment therefore for these two women against the wife, for what it is worth; that, of course, it will be in the ordinary Married Woman's Property form; and the case against the husband must be dismissed. The two plaintiffs will have their costs against the wife, but they must pay the husband's costs."

Under the old law it was well established that in such a case as this a husband and wife cannot be jointly sued for a post-nuptial tort of the wife if the tort is directly connected with a contract of the wife's, and forming with the contract one transaction. It is only necessary to refer to a few of the leading authorities on this point. In *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) Pollock C.B., delivering the judgment of the Court, composed of Parke, Alderson and

(1) 9 Ex. 422.

Martin BB., and himself, laid down the law upon the point in the words that have been already quoted.

In *Wright* v. *Leonard* (1) the female defendant, the wife of the male defendant, had falsely and fraudulently represented to the plaintiff that certain acceptances purporting to be those of her husband were in truth and fact accepted by him, which they were not. It was held by Williams and Willes JJ. that the husband was properly joined as a defendant. Erle C.J. and Byles J. held that he was not, the false representation being, in their views, in substance a warranty of a debt, and so in the nature of a contract. The plaintiffs being desirous of taking the opinion of a Court of Error, Williams J. withdrew his opinion, and the judgment was consequently entered, pro forma for the defendants. The judgment delivered by Willes J. has in subsequent cases been treated as accurate and helpful. After stating what the false and fraudulent representation of the wife consisted in, he said (2): "The question is, whether these facts constitute a cause of action against the husband and wife. We are of opinion that they do. As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is 'directly connected with the contract with the wife, and is the means of effecting it, and part and parcel of the same transaction.' Such was the decision of the Court of Exchequer in *The Liverpool Adelphi Loan Association* v. *Fairhurst*. (3) This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled . . . . to infringe further upon the general rule of law."

(1) 11 C. B. (N. S.) 258. (2) 11 C. B. (N. S.) 266.
(3) 9 Ex. 422, 429.

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The learned judge thus clearly states the necessity from which the practice arose of joining a husband as a defendant with his wife in actions for her torts, for "conformity," as it was styled, and the peculiar consequences of it. It was solely because she could not be sued alone, not that her tort was his tort, or that he shared to any extent in the guilt of it. Being a defendant, if judgment was recovered, it would necessarily be recovered against both, and might be satisfied out of the husband's assets, but there was this peculiarity about it; that if, before the action was concluded, the wife died, the action abated, and if the husband died the wife might be sued alone, and no damages could be recovered from the husband's representatives. In the latter case the question to be dealt with presently at once arises: Does the Married Women's Property Act of 1882, which enables a married woman to sue and be sued alone, and any debt or damages recovered against her to be satisfied out of her separate property, alter or supersede to any, and, if so, to what, extent, the procedure and practice which Willes J. so clearly described as existing under the common law?

This question was answered to a considerable extent in the case of *Earle* v. *Kingscote*. (1) There a contract was entered into by K., a married woman, with one E., under which E. was to pay a sum of money on a certain event. K. subsequently by a false and fraudulent representation that this event had happened induced the plaintiff to raise and advance this money. It was not at the trial alleged that her husband had any knowledge of the circumstances attending the advance, or had ratified his wife's action, or had participated in the money received. The plaintiff E. claimed in her action that K.'s husband was liable to her for the sum advanced, expenses, interest and damages. The facts were admitted, and the question was whether K.'s husband, Howard Kingscote, was liable for his wife's tort under the foregoing circumstances. It was agreed that judgment should be entered against his wife for 1500*l.* and costs payable out of her separate property in the form settled in *Scott* v. *Morley*. (2) The case was heard

(1) [1900] 1 Ch. 203; C. A. [1900] 2 Ch. 585. (2) 20 Q. B. D. 120, 132.

by Byrne J., who did not deal with the Married Women's Property Act of 1882, apparently because it was, as stated at p. 205 of the report, agreed that the question for decision was one of common law not affected by this and other similar Acts. The judge held, however, that the defendant, Howard Kingscote, was liable in damages for the tort complained of on the ground that the wife's contract was effected prior to and independently of the fraud complained of, and that he (the judge) was unable to say that the fraud was the means of effecting the contract in the sense in which that expression is used in the statement of the law he had quoted from *Liverpool Adelphi Loan Association* v. *Fairhurst.* (1) The appeal from this decision was heard before a Court composed of Lord Alverstone M.R., Rigby L.J. and Collins L.J. (as he then was). The appeal was dismissed on the ground that the fraud had nothing to do with inducing the parties to enter into the contract.

"All that the contract afforded in this case," said Collins L.J., in delivering judgment (2), "was a convenient opportunity to the defendant to commit a fraud if she were so minded: it had no other relation to the fraud. The fraud might have been committed altogether independently of the contract, and, therefore, it seems to me that in this case the fraud is distinctly separated from the contract, and can in no sense be said to be the means of effecting it."

But the Court of Appeal decided in addition to this point three others: (1.) that the liability which existed before the Married Women's Property Act of 1882 was not affected by that Act, nor was the remedy of the party injured limited by the Act to the wife's separate estate, if any; (2.) that the Married Women's Property Act did not exempt the husband from liability; and (3.) that the expression, "need not be joined," in s. 1, sub-s. 2, of the Act, does not mean that whenever a plaintiff is suing a married woman in contract or in tort, she shall not join her husband with her, but only that the joinder, which was formerly necessary, is now unnecessary if the plaintiff is only seeking to obtain relief out of the wife's

(1) 9 Ex. 422, 429. (2) [1900] 2 Ch. 593.

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separate estate. Point No. 2 was apparently decided on the authority of *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) and *Wright* v. *Leonard* (2), both already cited, and the third point apparently on the authority of *Seroka* v. *Kattenburg*. (3)

It is necessary to examine the reasons given by the learned Lords Justices for the conclusion at which they arrived, especially as to point No. 3. Lord Alverstone (4) said: "Sects. 14 and 15" (i.e., of the Act of 1882), "as Smith J. pointed out in *Seroka* v. *Kattenburg* (3), expressly deal with torts before marriage and limit the liability of the husband, in that case as well as in others, to the separate estate coming to him by virtue of the marriage. I think it would be a very strong thing to say, there being no words in the statute dealing with torts after the marriage, that, under the words 'need not be joined,' in sub-s. 2 of s. 1, the liability of the husband was taken away. *Seroka* v. *Kattenburg* (3) is, in my opinion, good law, and for that reason I think the point raised on the Married Women's Property Act does not avail the appellant in this case, and this appeal must therefore be dismissed."

Rigby L.J. agreed that the case did not fall within the class where a misrepresentation had induced a contract, and then as to the construction of the Married Women's Property Act of 1882 said (5): "I have had considerable doubts, not now for the first time, but over and over again; and I doubt whether, after any amount of consideration, I should come to a perfectly clear conclusion as to what was meant. I think it safer, therefore, to say I cannot find the very words which would release a husband from a liability which at common law he was subject to; and therefore I think it better, as the lesser of the two difficulties, to say it was not intended that he should be released." Collins L.J. was, however, much more confident and decided. He said (6): "As to the effect of the Married Women's Property Act, it seems to me that I cannot usefully add anything to the decision of the Court of Appeal in the case of *Weldon* v. *Winslow* (7), and the judgment

(1) 9 Ex. 422.
(2) 11 C. B. (N. S.) 258.
(3) 17 Q. B. D. 177.
(4) [1900] 2 Ch. 590.
(5) [1900] 2 Ch. 591.
(6) [1900] 2 Ch. 594.
(7) (1884) 13 Q. B. D. 784.

of the Divisional Court in *Seroka* v. *Kattenburg*.[1] (1) Those cases seem to put the question beyond reasonable doubt, and, but for the hesitation of my brother Rigby, I should have thought it perfectly clear that the Married Women's Property Act does allow a married woman to be treated as a feme sole for certain purposes only, and gives her rights in respect of her separate property, and imposes liability upon her in respect of that property. It also relieves the husband from his common law liability for her torts and contracts made before marriage to the extent to which he takes a benefit from her property by the marriage. But, having done that, the Act leaves things as they were, and it is not the case that a person who has been injured by the wife's tort committed during coverture, and who knows that the wife has no separate property, is now by the operation of this Act limited to an action against her in respect of her separate estate—a separate estate which perhaps does not exist. In my judgment the Act, in giving that person a right against the wife's separate estate, which may or may not exist, has not deprived him of the right to proceed against the husband."

In *Cuenod* v. *Leslie* (2) Cozens-Hardy M.R. (as he then was) simply treats the decisions in *Earle* v. *Kingscote* (3) and *Seroka* v. *Kattenburg* (1) as binding upon him, but does not criticize them, or either approve or disapprove of them. Buckley L.J. (as he then was) also said that these cases were binding upon him, and stated in so many words that he expressed no opinion upon s. 1, sub-s. 2, of the Married Women's Property Act of 1882. Fletcher Moulton L.J. (as he then was) admitted also that these decisions were binding upon him, but gravely doubted their soundness, and expressed the opinion that they should be reviewed by a court of appeal, as the state of things was anomalous. From his judgment it would, to me, appear, that he thought a wife should as regards, at all events, her post-nuptial torts, be placed very much in the position of a feme sole, at all events to this extent, that as to such torts a husband should never be made

(1) 17 Q. B. D. 177. (2) [1909] 1 K. B. 880.
(3) [1900] 2 Ch. 585.

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a co-defendant with her or that damages should never be recovered against him in respect of her torts; that apparently it was the purpose and intention of the draftsman of the Act and of the Legislature which passed it, that this change in the law should be brought about, but that by the use of the permissive word "may" instead of the compulsory word "must," that intention had been defeated. It would appear to me that the Act of 1882 only subjected the wife to what Lord Bowen in *Scott* v. *Morley* (1) happily styled not a personal but a "proprietary liability," and that, therefore, if she had no separate property, though her husband might be a millionaire, with whom she lived in luxury enjoying his wealth, those whom she chose to libel or assault, or with whom she might break any contracts she made, could not recover anything from her as damages for the wrongs she had done them, since according to s. 1, sub-s. 2, of this Act, "any damages or costs recovered against her in any proceedings" are "payable out of separate property, and *not otherwise*." In *Scott* v. *Morley* (1) the question was whether since the passing of the Act of 1882 a married woman against whom a judgment had been recovered could be committed under s. 5 of the Debtors Act of 1869. The judgment of Lord Bowen is most instructive. He states that the power of committal under this Act, though not an equivalent for the old process of capias, was more or less a substitute for it, but shows that the Act of 1882, by using the words "rendering herself liable in respect of and to the extent of her separate property on any contract," excludes personal liability, and he lays it down that a judgment directing a sum to be paid out of a married woman's separate property does not create a "debt due from her" within the meaning of s. 5 of the Debtors Act.

It may possibly be, though authority seems to be against it, that the principle upon which *Liverpool Adelphi Loan Association* v. *Fairhurst* (2) was decided does not apply where the wife happens to be possessed of separate estate, since the Married Women's Property Act of 1882 enables her to enter into and render herself liable in respect of and to the extent

(1) 20 Q. B. D. 120. (2) 9 Ex. 422.

of that estate on any contract. Her separate estate becomes in effect charged with any damages that may be recovered against her, but she does not become personally liable. In *Scott* v. *Morley* (1), Lord Esher, referring to the first section of this Act, said : " This section really imposes a new liability on a married woman at law, which will produce the same result as was before the Act produced in equity. In equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at law as was before the Act produced in equity by a different process." A similar view is expressed by Lord Bowen. The form of judgment settled in *Scott* v. *Morley* (1) has now been held to be imperative : *Oxley* v. *Link*." (2) I cannot discover, however, any good reason why the *Adelphi* case (3) should not apply if the wife has no separate estate and her husband acquires no property from her, as the statute does not give to her a general power to form binding contracts for the breach of which she would, under all circumstances, be as liable as if she was a feme sole. In addition the wife's property cannot be charged for a breach by her of a contract where a restraint upon alienation has been imposed upon her unless that restraint has been imposed by herself. I have not been able to find that during the forty-one years which have elapsed since this statute was passed it has ever been decided that where a husband and wife are sued for a tort committed by her it is necessary in order to exclude the application of the *Adelphi* case (3) to aver or prove that the wife was not possessed of separate estate. In *Earle* v. *Kingscote* (4) the wife had separate estate, but the husband was held liable notwithstanding, not because of the provision of the Married Women's Property Act of 1882, but because the wife's fraud was said to be a naked fraud ; i.e., a fraud altogether unconnected with and independent of her contract.

In *Beaumont* v. *Kaye* (5) a husband and wife were sued for

(1) 20 Q. B. D. 120, 126, 132.
(2) [1914] 2 K. B. 734.
(3) 9 Ex. 422.
(4) [1900] 2 Ch. 585.
(5) [1904] 1 K. B. 292, 293, 294.

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a libel published by the wife. The wife pleaded that she did not publish the libel; the husband pleaded a defence averring that as far as he was liable for his co-defendant, the wife, he paid money into Court. The pleading contained no averment that the wife had no separate estate. The plaintiff applied to the registrar to strike out the husband's defence. The registrar refused to do so. His decision was reversed by Bucknill J. on appeal. The husband appealed to the Court of Appeal. In giving judgment, Collins M.R. (as he then was) said: "This case appears to me to be quite clear, when once the conclusion is arrived at that the old common law action against the husband and wife jointly in respect of the tort of the wife still exists, and that this is such an action. It was suggested, after the passing of the Married Women's Property Act, 1882, that the effect of it had been in such cases to do away with the old common law action against husband and wife jointly, and that the only right of action thenceforth was against the wife in respect of her separate estate. The question whether that was so arose in *Seroka* v. *Kattenburg* (1), and it was decided in that case by Mathew and A. L. Smith JJ., that the old common law right of action against the husband and wife jointly for the wife's tort continued to exist. That case came up for discussion in the Court of Appeal in *Earle* v. *Kingscote* (2), and was held to have been well decided. In this case the statement of claim appears to me to be framed solely upon the old common law right of action against the husband and wife jointly for the tort of the wife, and the pleader has carefully abstained from introducing anything in the nature of a claim against the wife separately under the Act. The husband by way of defence to the claim so made pleads payment into Court without denying liability, and the effect of that is an admission as regards both husband and wife that is incompatible with the subsequent suggestion by the wife that there was no libel by her." Romer L.J. agreed. He said: "This being the old common law action against the husband and wife jointly for the tort of the wife, there cannot be separate judgments with

(1) 17 Q. B. D. 177. (2) [1900] 2 Ch. 585.

regard to the husband and wife. The husband is only liable, and is only sued, in respect of his wife ; and, so far as he is concerned, there could only be a judgment against, or in favour of, him and his wife jointly," and he winds up by saying : " This is a common law action framed in the ordinary way, and it appears to me that there can only be one defence, and one judgment." This is a clear decision not only that the old common law form of action may still be brought, but that it will suffice to frame it in the ordinary way, and that it is unnecessary to introduce an averment into the writ of summons or statement of claim, or to prove, that the wife has no separate property, in order to exclude the application of the Married Women's Property Act of 1882.

The judgments of Bray and Horridge JJ. in *Cole* v. *De Trafford* (1) bear directly upon this point. In that case, Sir Humphry and Lady de Trafford, his wife, were sued by a chauffeur, who was hired to drive Lady de Trafford's motor car and attend to it in a certain garage, for personal injuries sustained by him while in this garage. In reference to this injury the Court followed the judgment in the *Adelphi Loan* case (2) and in *Earle* v. *Kingscote*. (3) Bray J. cited the passage from the judgment of Collins M.R. in the later case which I have already quoted, and then said : " In the present case the cause of action is for a breach of duty arising out of a contract. It is said that the duty arose out of an invitation to enter the garage ; but there was no invitation except under the contract of employment. In order to prove the invitation it was necessary to prove a contract. The duty which arose from the invitation commenced with and continued throughout the employment of the plaintiff, and was merely part and parcel of that transaction. Therefore this tort was based upon contract and the husband is free from liability." Horridge J. expressed himself to the same effect. In *Burdett* v. *Horne* (4) the action was brought in respect of a fraudulent misrepresentation made by the wife to the plaintiff's loss and injury. Lawrance J., in delivering

(1) [1917] 1 K. B. 911, 915.
(2) 9 Ex. 422.
(3) [1900] 2 Ch. 585.
(4) (1911) 27 Times L. R. 402, 404.

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judgment, said: "With regard to those contentions I have come to the conclusion that the whole matter was fraudulent: the so-called contract was fraudulent in the representation of the existence and position of the Madagascar scheme, and I think the language of Lord Collins in *Earle* v. *Kingscote* (1) applies. The principle enunciated in the case of *Liverpool Adelphi Loan Association* v. *Fairhurst* (2) does not and ought not to apply where the real substance or gist of the matter is in fact a tort, and would necessarily and properly be expressed as a tort, although by ingenuity it might be framed into a statement of a contract." The learned judge distinctly recognizes *Earle* v. *Kingscote* (1) as a binding authority.

In *McNeall* v. *Hawes* (3) A. had an insurance upon his life; his wife wanted to raise money. She gave the policy of insurance to one H. and with it a notice in her husband's name of a lien upon the policy in order to induce the defendant to lend money to H. Her husband's signature to the notice of lien was forged by the wife. H. deposited the policy and notice of lien with the defendant, who lent him money on these two documents as a collateral security for the loan. In an action brought by the husband for a return of the policy the defendant counterclaimed against the husband and wife for the false and fraudulent representation of the wife that the notice of lien was valid, whereby he, the defendant, had been induced to lend his money. It was held by Bankes and Scrutton L.JJ. in the Court of Appeal that the principle laid down by Pollock C.B. in the *Liverpool Adelphi Loan Association* case (2) applied; that the contract with the wife was directly connected with her fraud, which was the means of effecting the contract, and that both formed one transaction, with the result that the wife could not be made responsible and that she and her husband could not be sued together for these damages.

Bankes L.J. in delivering judgment said, referring to torts committed by the wife: "The law in relation to the husband's liability for such a tort rests on a fiction which, in spite of the

(1) [1900] 2 Ch. 585, 591, 592.
(2) 9 Ex. 422.
(3) [1923] 2 K. B. 538, 544, 546; 39 Times L. R. 362.

passing of the Married Women's Property Act, 1882, must still be recognized by this Court. This is the result of the decision in *Earle* v. *Kingscote*. (1) The present state of the law is so accurately stated by the learned judge in his reported judgment (2) that there is no need to repeat here what he there says." Later on he said: "Under these circumstances I consider that the appellant has established in the present case that, to use the language of Chief Baron Pollock in *Liverpool Adelphi Loan Association* v. *Fairhurst* (3), the fraud complained of 'is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction'; and as a result 'the wife cannot be responsible' nor can 'the husband be sued for it together with the wife.'" It was not averred or proved that Mrs. McNeall had no separate estate. It did not appear whether she had any or not. This case is a distinct authority that the principle of the last named case applies, even if there be no averment or proof that she had not any, and it would appear to me that the result of these authorities is that the principle of that case would apply, though it should not be proved that the wife had not any separate estate.

A review of these authorities, and of others to the like effect which I have not cited, leads my mind to the conclusion that the judgment of Collins L.J. in *Earle* v. *Kingscote* (1) contains the soundest exposition of the law touching the construction to be put on the Married Women's Property Act of 1882. I think that *Seroka* v. *Kattenburg* (4) was rightly decided. I further think that, notwithstanding the provision of the Married Women's Property Act of 1882, the old common law action can be maintained against a husband and wife jointly in respect of a post-nuptial tort of the wife, that to maintain it successfully it is not necessary to allege or prove that the wife has no separate estate, and further I am inclined to the opinion that the averment and proof that she has such estate could not defeat the action. I am therefore of opinion that this appeal fails and should be dismissed with costs.

(1) [1900] 2 Ch. 585, 591, 592.
(2) [1923] 1 K. B. 278.
(3) 9 Ex. 429.
(4) 17 Q. B. D. 177.

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LORD SUMNER (read by VISCOUNT CAVE). My Lords, there are two questions here: firstly, whether, since the Married Women's Property Act of 1882, a husband is still answerable for a tort committed by his wife alone during coverture; and, secondly, if so, whether on the facts of this case the respondent's wife was not in truth guilty of a fraud "directly connected with her contract," so that before 1882 she could not have been made liable nor by consequence can he be liable now.

The first question ultimately depends on the construction of s. 1, sub-s. 2. The controversy is an old one. The original edition of that valuable text-book Lush on Husband and Wife in 1884, dwelling principally on the concluding words "and not otherwise," expressed the opinion that the effect of the sub-section was to enact that a husband cannot be sued jointly with his wife in respect of her torts. The contrary was afterwards decided in *Seroka* v. *Kattenburg* (1), a decision which the same author criticized in 1887 in his "Married Women's Rights and Liabilities." The Court of Appeal affirmed *Seroka* v. *Kattenburg* (1) in *Earle* v. *Kingscote* (2) in 1900, Rigby L.J. doubting. In *Cuenod* v. *Leslie* (3) in 1909 Fletcher Moulton L.J. examined these decisions at length. I do not understand either Cozens-Hardy M.R. or Buckley L.J., who were then his colleagues, to have done more than dissociate themselves from his strictures upon an authority, by which the Court was bound. Shortly afterwards, in *Brown* v. *Holloway* (4), the High Court of Australia interpreted a section of a Queensland Act, which is expressed in the same terms, as releasing the husband from liability to be sued with his wife for her tort, a decision whose high authority calls for a full examination of the question when it now, after forty years, arises for the first time before your Lordships.

The argument, which is throughout virtually that of Fletcher Moulton L.J., is shortly this. By the common law of Baron and Feme, a husband was not truly "liable" for his wife's sole tort committed after marriage, but, if she was to be sued for it, he must be joined with her as a defendant, and then he

(1) 17 Q. B. D. 177.
(2) [1900] 2 Ch. 585.
(3) [1909] 1 K. B. 880.
(4) 10 C. L. R. 89.

might be sued to judgment. Without him, she could bring an action against her to a standstill; without her he could not be sued at all. Till judgment, he was nothing but a party to the action, joined, as it was said, "for conformity." After judgment, however, he was bound. Hence, to have said in 1882 that he should not be "liable" to be sued for his wife's sole tort would have been wrong. The correct way of relieving him was to say, as sub-s. 2 did say, that he need not be joined, and the only way in which a plaintiff could reach him being thus negatived, it follows that he goes free.

The sub-section is in the main an enabling provision in favour of the wife. She is made capable of suing and of being sued as if she were a feme sole, and it is added, possibly a little superfluously, that her husband need not be joined with her, which, indeed, if she is really to be treated as unmarried, he cannot be, for then he would be legally a stranger. On the bare language, I think the words "and her husband need not be joined" merely relieve the plaintiff, whether the married woman or a third party, from the necessity of joining the husband, without interfering with the existing right to do so, such as it was. It is a procedural provision, not an alteration of substantive rights against the husband. The concluding words of the sub-section are "and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." Grammatically, I think this means damages "recovered" (in such an action as that before described, when she is the sole defendant) "shall be payable" (by her, since she is the sole defendant) "out of her separate property, and not (by her under pressure of any other means of execution to enforce payment) otherwise." To read it as meaning "and not out of her husband's property" is impracticable, for she cannot pay out of his property and the judgment creditor cannot get payment out of him, since "in such an action" he has not been joined.

Turning now to the substance of the sub-section, it is evident that the married woman gains her liberty in litigation on the terms of the same liberty being given to those who wish

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to sue her. If she is to be enabled to sue them single-handed, they are to be enabled to sue her by herself, but why are they to be deprived of their existing right at common law to sue her husband as well, if they choose? When a new liability is created—namely, that of a married woman, to be sued on her contracts but only in respect of her separate property—the liability and its limits are clearly stated in the Act. When an old liability is cut down—namely, that of the husband for the full extent of the wife's ante-nuptial debts—it is done in plain words by s. 14. If the husband's old liability in respect of his wife's torts is to be taken away by s. 1, sub-s. 2, it also ought to be done by clear words. In themselves the words used seem to me clear to preserve it. Third parties, says the Legislature, need not join the husband as a defendant with the married woman. Thus they are saved the expense and delay involved in finding and serving him, if the wife's separate property suffices for their purpose. Conversely, having sued her alone to judgment, they must look to her separate property alone, and cannot, for example, get her committed to prison under the Debtors Act, 1869. On the words themselves, I do not see in this sub-section any intention either to penalize the victims of the married woman's torts or to relieve her husband from his previous burdens.

My Lords, I would make two further observations. The first is that, as those who remember the Married Women's Rights' controversy before 1882 will all recognize, the whole effort was to free the married woman. It was not a campaign to assist the married man. Generally speaking, the Act of 1882 was a Married Women's Property Act, not a Married Man's Relief Act. The other is that, if *Seroka* v. *Kattenburg* (1) was wrongly decided, the intention of the Legislature, then quite recently declared, was defeated in an important respect. Twice since then—namely, in 1893 and in 1903—the Legislature has amended the Married Women's Property Act of 1882, but on neither occasion has it seized the opportunity to declare and give effect to any intention to relieve married men from

(1) 17 Q. B. D. 177.

the liability to be joined in actions of tort brought against their wives.

My Lords, on examination the respondent's argument, in my judgment, fails. It really rests on an excessive insistence on the language used in *Capel* v. *Powell* (1), where it is explained that persons who suffer by the wife's sole tort have no cause of action against the husband, for his sole liability is to be joined for conformity, so much so that, if the marriage be dissolved before writ, the necessity for joining him no longer exists. It is on this description of the necessity for joining him, his wife having during coverture no such existence as to enable her to be a suitor alone or in her own right, that the respondent rests his argument as to the meaning of the words " need not be joined " in s. 1, sub-s. 2, of the Act of 1882, and as to the distinction between liability to be joined as a defendant for conformity and liability to the plaintiff upon a cause of action, by which he justifies the contention that s. 14 could not be an appropriate section for the relief of the husband, the place for which must be in s. 1, sub-s. 2.

Such an interpretation, I venture to think, would defeat a good part of the clear intention of the sub-section. The word " liable " is equally appropriate in either case. It does not matter by what route the husband's liability is established, or by what minor limitations it is in one case reduced though not in another. After all, what makes a defendant liable is a judgment against him : till that is pronounced, he may or may not become liable, but he is not liable for the time being. After judgment, the husband, though he had only been joined " for conformity," could be sold up under a fi. fa., or sent to prison under a capias. Before judgment, subject always to proof of the plaintiff's case, he could escape this inexorable doom only by parting with his spouse, his money, or his life. A judicial separation, or a divorce a vinculo matrimonii, or an adjudication in bankruptcy was a bar to judgment against him. Quoad ultra, his only resource was to depart this life without delay. I do not think " liability " for his wife's torts

(1) 17 C. B. (N. S.) 743.

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an inappropriate term to describe his case, and in fact it has been regularly so used. Thus, in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1), Pollock C.B. says: "She is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her." So Erle C.J. in *Capel* v. *Powell* (2) says *Head* v. *Briscoe* (3) is an authority that for wrongs committed by the wife during coverture the husband is jointly liable; and, in *Wainford* v. *Heyl* (4), Jessel M.R. says: "She is not liable for general torts, but her husband is liable. . . . . Strictly speaking, she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability." So Romer L.J.: "The husband is only liable, and is only sued, in respect of his wife": *Beaumont* v. *Kaye*. (5) Finally, s. 26 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), provides that, in any case of a judicial separation, the wife shall, while so separated, be considered as a feme sole for the purpose of contract and wrongs and injuries, and suing and being sued, in any civil proceeding, and that her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her. Whether or not in these and other similar passages the word "liable" is used with theoretic accuracy, it is at any rate reasonably clear that, if s. 14 of the Act of 1882 had added, after the words "or otherwise," the words "nor shall he be liable for any wrong committed by his wife during coverture," it would not have been guilty of any legal solecism, and it would have expressed lucidly what, even if the respondent is right, is only expressed obscurely in s. 1, sub-s. 2.

The words in this sub-section "and her husband need not be joined" must be read either as dispensing a legal actor from the procedural necessity of doing something, or as relieving persons, who are legally exposed to the consequences of that procedure, unless dispensed with, from further liability

(1) 9 Ex. 422, 429; 23 L. J. (Ex.) 163, 165.
(2) 17 C. B. (N. S.) 743, 749.
(3) 5 C. & P. 484.
(4) L. R. 20 Eq. 321, 324.
(5) [1904] 1 K. B. 292, 294.

to suffer them. In neither case can the use of these words be regarded as proof of that highly exact draftsmanship, which is the foundation of so much of the opinion of Moulton L.J., but it is only in the latter case that the respondent's argument is possible. For my part, I think the whole sub-section is a vigorous, if inexact, statement of the legal emancipation of the married woman, which suffers somewhat from excessive concision. As a statement of an intention to relieve the husband it seems to be quite inadequate. The sub-section deals in one and the same sentence with actions of tort and actions of contract, with actions brought by and actions brought against the feme covert, and in respect of all of them it purports to remit her to the position of a feme sole. Confusion naturally arises from trying to make one sub-section do the work of four. To begin with, if in all respects she is to sue as if she was a feme sole, she can sue or be sued by the person who is in fact her husband, since his relation to her in marriage is excluded by the hypothesis that for legal purposes she is single. This, however, is put right by the express limitations imposed in this regard by s. 12. Next, the sub-section proceeds as if the position of a feme covert was the same in regard to torts as it is in regard to contracts, and the words relating to the need for joining her husband apply grammatically to both classes of action alike. This was not the real position in law. The joining of the husband for conformity was peculiar to actions of tort. In law a married woman could not buy or sell, but she could slander and she could assault. In the first case either she contracted with her husband's authority, express or implied, or she did not. If she did, the cause of action was against him. The liability was his, and she was not the person to be sued, for she was only an agent. Her plea of coverture was a plea in bar. With him it was not a question of joinder—he was the party to be sued.

In torts, on the other hand, the plea of coverture was only a plea in abatement. If the feme sole did not choose to plead her coverture, the action could proceed to judgment, and judgment against her would be regular, though it might be

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barren. If she did, she and her husband, when joined, so far constituted one defendant, that they could not set up incompatible defences and the judgment was one judgment against both. So with the converse case, where the cause of action, whether in contract or tort, was to be enforced against third parties. In the action on the contract the husband was the plaintiff and the wife was not. In the action of tort he had to be joined if the action was to be properly constituted, but, I do not know that the wife could compel him to sue against his will. Accordingly the provision enabling her to sue without him for a tort to herself was a statutory liberty for her, but it was not a relief to him.

This inexactitude probably does not much matter, if s. 1, sub-s. 2, is only a section enabling the married woman and, to a certain extent, enabling those, other than her husband, who have occasion to sue her. Its general intent is plain and no difficulties need arise. If, however, it is to be treated further as relieving the husband, they seem fatal. In this case the words must mean "her husband shall not be joined with her," etc. If so, a husband and wife, who have been jointly assaulted, must bring separate actions, and cannot sue together, although the Common Law Procedure Act, 1852, s. 40, expressly provided that in such a case the husband's personal claim for the wrong to himself might be included in the action, in which he and his wife sued for the wrong to her. If they have committed a joint assault, the sufferer must incur two sets of costs and run the risks involved in signing judgment first against that defendant, who has not got the money. If the wife wishes to enforce her rights as a beneficiary against trustees, one of whom is her husband, she must leave him out of the action, for the words "need not" are now taken to mean that the husband shall not "be made a party to any action or other legal proceeding brought by or taken against her," an impossible procedure. Of course, these difficulties may be got over by reading in the words "for conformity" after "joined," but that is not what the Act says. Such a device is really a project for legislation in 1924 and not a construction of the legislation of 1882. Yet without it

confusion is introduced into the ordinary course of litigation, for which no reason in policy has ever been suggested.

If then the Act of 1882 does not interfere with the husband's liability for the torts of his wife as it theretofore existed, did the liability extend so far as to make the respondent answerable for such a wrong as his wife did to the appellants in this case? With all respect to the cogent argument contained in the dissentient judgment of Younger L.J., I think it did, though I fully appreciate his pointed criticism, that the means of effecting the wife's fraud consisted in her own lies and not in any implied warranty of her authority. In a series of decisions, of which the last is *Wright* v. *Leonard* (1), it had been settled long before 1882 that a husband was not liable for his wife's deceit, if it was part of one transaction, intended to culminate in a contractual obligation. The Legislature has not dealt with this rule. It modified, to the advantage of the husband, the wider proposition, which existed to the advantage of parties injured by the wife's acts. Obviously unless the party injured could in some way recover against the husband, the remedy against the wife alone was likely to be barren, for at common law it would be confined to the chance, that if she was taken on a ca. sa. her husband might pay for her release. On the other hand, if the husband should be made answerable in cases where his wife's tortious conduct was part of one transaction ending in a contract, he would be held liable on her contract, though she had entered into it without his authority, a thing contrary to the general law. The Legislature may well, I think, have considered this state of things to be so far fair as not to call for amendment and so have tacitly approved of it. The decisions in question were furthermore given by very eminent judges, and, if I may venture to say so, are in conformity with the theory of the common law of Baron and Feme. As I take it the matter stands thus. At law, if the thing which the married woman had done wrongfully and without her husband's authority was purely tortious, he might be made to answer for it; but if it was purely

(1) 11 C. B. (N. S.) 258.

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contractual, he could not. For this purpose the substance of what had been done had to be looked at. If it was merely a tort and nothing else, the husband was liable, even though by way of legal remedy an alternative cause of action against the wife, had she been a feme sole, could have been pleaded in contract. Perhaps waiving the tort and suing in assumpsit is an instance of this. On the other hand, as Collins L.J. points out in *Earle* v. *Kingscote* (1), if the substance of the matter was the making of a contract, the mere fact, that an ingenious pleader might find a way of framing a cause of action in tort, would not make the husband liable. This proposition was not, however, as it seems to me, intended to be exhaustive. Suppose that on the facts, as in the present case, there was a genuine tort, for which an action of deceit would lie, but that there was also a no less genuine contract: what then? Does it rest with the pleader to make the husband liable by alleging the tort and ignoring the contract, or has not the law, too, something to say in the matter?

What is the reason why, in such cases as *Liverpool Adelphi Loan Association* v. *Fairhurst* (2) and *Wright* v. *Leonard* (3), the husband was not liable, if the tort and the contract formed part of one transaction? If it was merely to protect the married woman from being sued on a contract, that reason for the rule has now to a large extent gone since the Act of 1882 was passed, for a married woman's contracts can be and are now enforced, though it is true only to the extent to which she has separate estate. On the other hand, if an action of tort were allowed, wherever the facts could be so pleaded, the person losing the protection would in substance be the husband rather than the wife, for her liability on the joint judgment against both affected her only through a ca. sa. or the Debtors Act, while his could also be made effective by a fi. fa. or an elegit. Further, the law always treated the married woman tenderly with regard to a ca. sa. It was long ago held, somewhat quaintly, that if both were taken on a ca. sa. and the husband escaped the wife should be released; for his escape

(1) [1900] 2 Ch. 585. (2) 9 Ex. 422.
(3) 11 C. B. (N. S.) 258.

was hers: *Jackson* v. *Gabree* (1); and, though homage continued to be paid to the rigour of the law, whereby a judgment creditor was entitled to hold the married woman's person, though she was penniless, for peradventure some compassionate friend might find the money for her discharge, *Larkin* v. *Marshall* (2); still from Mr. Tidd's time onwards it was the regular practice for Courts of law to set at liberty a married woman who was shown to have no separate estate and whose incarceration could have no purpose except that of "working unduly upon her husband's feelings": *Edwards* v. *Martyn*. (3)

Accordingly, my Lords, I think the ultimate foundation of these decisions is the clear common law principle, that a married woman could not bind herself by a contract. Not even in a representative capacity as executrix, or as a sole trader by the custom of the City of London, could she be dealt with by a Court of law, unless her husband was joined in respect of her engagements. Her contracts were "altogether void," as Pollock C.B. says in *Fairhurst's* case. (4) If, then, the facts showed a contract by her, however arising, the legal result could only be nil, for it was no contract in law. No pleading could change such facts, and although in themselves they might be such as would equally give rise to a claim in tort, what prevailed was necessarily the circumstance, that, if there was anything, there was a contract by her, a thing that could not be. Accordingly in such a case the husband could not be made liable, for, even if the action was framed in tort, he would either be sued on a contract, which could not have been made with his authority, or he would be joined for conformity to an action brought against the wife for conduct of hers, which the law was bound to ignore, because it purported to result in a contract binding on her.

It is, however, said that here there is no such contract, and that in this case *Wright* v. *Leonard* (5) can be distinguished. I think this argument is untenable. It is true that neither

(1) (1669) 1 Vent. 51.
(2) (1850) 4 Ex. 804.
(3) 17 Q. B. 693, 698.
(4) 9 Ex. 429; 22 L. J. (Ex.) 164.
(5) 11 C. B. (N. S.) 258.

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the plaintiffs nor the married woman had ever heard of *Collen* v. *Wright* (1), and that the plaintiffs only thought of contracting with the husband, but the wife's implied warranty of her husband's authority was not therefore an unreality. It was a contract, though implied. It was in itself a true legal obligation, arising by law from conduct, which against any other actor would have been enforceable apart from the question of separate estate. I, accordingly, think that the husband is entitled in this case to raise the answer which *Wright* v. *Leonard* (2) lays down, that the passing of the Married Women's Property Act, 1882, has not in any way impaired this right, and that the appeal should be dismissed.

My Lords, I fully recognize that the Act of 1882 is illogical, as reforms often are. Whether it should now be amended, wiser heads than mine must settle ; but the very fact, that it could so easily be made thoroughgoing now, is ground for thinking that it was only meant to go halfway then. To assume that it was intended to revolutionize the law of Baron and Feme and to dissolve their legal unity so completely, that in litigation at any rate they twain should no longer be one flesh, is to beg the question. No special judgment was needed, if the woman during coverture was really and altogether as if discovert. The Act carefully avoids saying (apart from property which comes to him jure mariti) that a husband is not liable for his wife's post-nuptial torts, and, in putting an express limitation on his liability for her pre-nuptial torts, it seems to me to preserve his liability for her torts committed during marriage for the benefit of those who would otherwise have no remedy if she has no sufficient separate estate. Furthermore, if the Act is intended to leave the husband exposed as before to suits by third persons, it cannot be deemed to take away from him such protection as the law then existing gave him in cases where the wife's tort was immediately connected with a contract. The words " capable of entering into . . . . any contract " cannot be isolated, and in truth the married woman is not in the fullest sense capable of contracting, but only of binding her separate estate to

(1) 7 E. & B. 301 ; 8 E. & B. 647. (2) 11 C. B. (N. S.) 258.

answer a contract by which she is not bound herself. As for the judgment given in this case against the female defendant, she does not appeal and is not before us, and I do not think anything need be said about it.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, Oct. 31, 1924.

Solicitors for the appellants: *C. Butcher & Simon Burns.*
Solicitors for the respondent: *Sewell, Edwards & Nevill.*

[HOUSE OF LORDS.]

SUTHERLAND AND OTHERS . . . . APPELLANTS;
AND
STOPES . . . . . RESPONDENT.

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ET E CONTRA.

Defamation—Libel—Justification—Fair Comment—Distinction between Allegations of Fact and Expressions of Opinion—Misdirection—New Trial.

The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice on a matter of public interest is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.

Dictum of Collins M.R. in *Digby* v. *Financial News* [1907] 1 K. B. 502, 507 followed.

The plaintiff, who had published several books in favour of the artificial prevention of conception and had established a mothers' clinic for constructive birth control in a poor district in London, brought an action of libel against the author and publishers of a controversial work designed to expose the dangers alleged to be involved in artificial birth control. The passage complained of stated, in effect, that the plaintiff was taking advantage of the ignorance of the poor to subject them to experiments, and that at the plaintiff's clinic working women were instructed in a mode of contraception stated by an eminent professor of gynæcology

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

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to be the most harmful of which she had experience, and described the campaign carried on by the plaintiff as monstrous and as a more serious crime than that for which Charles Bradlaugh was condemned to jail. The defendants pleaded justification and fair comment. The Lord Chief Justice, in summing up, did not expressly tell the jury that the plea of justification covered the whole of the alleged libel, whether fact or opinion, and invited them to deal under the category of fair comment with expressions of opinion. The jury found that the words complained of were true in substance and in fact, but that they were not fair comment, and awarded the plaintiff 100*l.* damages. On these findings the Lord Chief Justice entered judgment for the defendants, but this judgment was reversed on appeal:

Held (Lord Wrenbury dissenting on both points), (1.) that judgment should be entered for the defendants; by Viscount Cave L.C., Viscount Finlay, Lord Shaw of Dunfermline and Lord Carson, on the ground that there was no evidence to support the finding that the comments were unfair; and by Lord Shaw of Dunfermline and Lord Carson, on the further ground that the finding of the jury on the plea of justification afforded a complete answer to the action; (2.) that a new trial ought not to be granted on the ground of misdirection, as no substantial miscarriage had been occasioned by the misdirection, if any.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal, whereby it was ordered that a judgment entered for the appellants, the defendants, at the trial of an action for libel before the Lord Chief Justice of England and a special jury should be reversed and judgment entered for the respondent (the plaintiff) for 100*l.*, with a special direction as to costs.

The following statement of facts is taken from the opinion of Viscount Cave L.C.:—

The plaintiff, Mrs. Marie Stopes, who is a Doctor of Science and a Doctor of Philosophy of the University of Munich, but has no medical qualification, has for some time been engaged in a campaign in favour of a practice which is known as "birth control," but which is more accurately described as the prevention of conception by artificial means, and in connection with this campaign has published certain books and has established a mothers' clinic for constructive birth control in a poor district in Holloway. The defendant H. G. Sutherland is a Bachelor of Medicine and of Surgery and a Doctor of Medicine of the University of Edinburgh, and is the author of a book called Birth Control: A Statement of Christian Doctrine against the Neo-Malthusians, which was published

by the other defendants, Harding and More, Ld., in March, 1922. This book, which is a controversial work designed to expose the dangers, social, medical and moral, which the author considers to be involved in the artificial prevention of conception, contains in its seventh chapter (headed "Evils of Artificial Control"), and in a section headed "Specially hurtful to the Poor," the following paragraph, which is admitted to refer to the plaintiff: "Secondly the ordinary decent instincts of the poor are against these practices, and, indeed, they have used them less than any other class. But, owing to their poverty, lack of learning and helplessness, the poor are the natural victims of those who seek to make experiments on their fellows. In the midst of a London slum, a woman who is a doctor of German Philosophy (Munich) has opened a birth control clinic where working women are instructed in a method of contraception described by Professor McIlroy as 'the most harmful method of which I have had experience' (Proceedings of the Medico-Legal Society, 7th July, 1921). When we remember that millions are being spent by the Ministry of Health and by local authorities—on pure milk for necessitous expectant and nursing mothers, on maternity clinics to guard the health of mothers before and after childbirth, for the provision of skilled midwives, and on infant welfare centres—all for the single purpose of bringing healthy children into our midst, it is truly amazing that this monstrous campaign of birth control should be tolerated by the Home Secretary. Charles Bradlaugh was condemned to jail for a less serious crime."

In consequence of the publication of the above paragraph the plaintiff brought this action against the defendants, claiming damages for libel and an injunction. The defendant Sutherland in his defence pleaded (1.) that the words complained of in their natural meaning were true in substance and in fact; (2.) that the words in their natural meaning were fair and bona fide comment made and published without malice on a matter of public interest; and (3.) as an alternative plea, that in so far as the words complained of consisted of allegations of fact they were true in substance and in fact and

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in so far as they consisted of expressions of opinion they were fair comments made in good faith and without malice upon matters of public interest. The defendants Harding and More put in a defence which was somewhat different in form, but which for practical purposes has been treated as being to the same effect as the defence of the defendant Sutherland. Particulars having been given and issue joined, the action went for trial.

The action was tried by the Lord Chief Justice with a special jury; and after a hearing which lasted for five days the learned judge put to the jury a series of questions which, with the answers given by the jury, were as follows :—

"(1.) *Question.* Were the words complained of defamatory of the plaintiff? *Answer.* Yes.

"(2.) *Question.* Were they true in substance and in fact? *Answer.* Yes.

"(3.) *Question.* Were they fair comment? *Answer.* No.

"(4.) *Question.* Damages, if any? *Answer.* £100."

On the following day the Lord Chief Justice, after hearing arguments as to the meaning and effect of these findings, gave judgment for the defendants; and as the reasons which he gave for taking that course throw light upon the course of the case, it is desirable to quote them in full: "In this case," he said, "the jury, after a protracted deliberation extending to something like four hours, have found by their verdict that the words complained of in this action, while they were defamatory of the plaintiff, were true in substance and in fact. In the course which the case took that really became the main issue. On the one hand, nobody denied the sincerity, the ability or the honesty of purpose of the plaintiff. On the other hand, there was no real evidence of ill-will on the part of the defendants. Mr. Charles, at the conclusion of the case for the plaintiff, submitted to me that there was no evidence of malice and invited me in effect to say that upon the defence of fair comment it was not necessary to submit any question to the jury. My own mind inclined in that direction, but upon the whole I thought it was more satisfactory, inasmuch as I thought the matter ought to be wholly before the jury, to

leave that question also to the jury, and I decided not to withdraw it. So it came about that at the conclusion of the matter there were two questions put to the jury: one of them upon the plea of justification, and the other upon the plea of fair comment. I have always understood that (in the words which have been quoted) it is a good defence to an action for libel that the words complained of are true in substance and in fact; and although no doubt suggestions were made and arguments were employed upon the one side and upon the other as to whether a particular element in the words complained of was fact or opinion, it was clearly put to the jury, I think—at least, it was put as clearly as I could put it myself—that it was for them to decide whether particular statements which had been the subject of observation on the part of learned counsel were fairly to be regarded as statements of fact or expressions of opinion. I pointed out to the jury again and again that the meaning of those words was a question entirely for them. After that direction they have found that the words complained of were true in substance and in fact. It does not appear to be possible to depart from the ordinary rule."

The plaintiff having appealed against this judgment to the Court of Appeal, that Court did not disturb the verdict, but by a majority (Bankes and Scrutton L.JJ., Younger L.J. dissenting) allowed the appeal and directed judgment to be entered for the plaintiff for 100*l.* and half the costs of the action. The decision of the majority of the Court was based on the view that the learned judge had invited the jury to distinguish between allegations of fact contained in the alleged libel and expressions of opinion, and to deal with the former under the plea of justification and with the latter under the plea of fair comment; and that, as under the latter head the finding of the jury was in favour of the plaintiff, she was entitled to judgment for the damages assessed by the jury and for a proportion of the costs. Hence the present appeal.

1924. Oct. 23, 24, 27. *Serjeant Sullivan K.C.* (of the Irish and also of the English Bar) and *Theobald Mathew* (with them

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Rabagliati and *Harold Murphy*) for the appellants. This action was fought throughout the trial on the plea of justification, and having regard to the facts before the jury their second finding that the words complained of were true in substance and in fact covered all the ground. If the substantive charge contained in the passage complained of as a libel is found to be true, the description of the plaintiff's campaign as monstrous and as a more serious crime than that for which Bradlaugh was condemned to jail carries the matter no further. There is therefore no room for finding 3. The test is whether these words of invective or reproach contain any ground of imputation substantially distinct in its nature and character from that which forms the main charge or gist of the libel. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it that need not be justified: *Edwards* v. *Bell* (1); *Morrison* v. *Harmer* (2); *Clarke* v. *Taylor* (3); *Cooper* v. *Lawson*. (4) The verdict amounts to this: "If on our findings we have to give the plaintiff anything we give her 100*l*." The plea of justification involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel, and if that plea is established the plea of fair comment does not arise: *Digby* v. *Financial News* (5); *Dakhyl* v. *Labouchere* (6); *Hunt* v. *Star Newspaper Co.* (7) No case before this has arisen in which it has been held or even suggested that justification was not a complete answer to a civil action for libel. But even if something is excepted out of the proof of justification in this case, still this is not a comment of such a nature in view of the facts as to be outside the bounds of fairness and honesty: *McQuire* v. *Western Morning News Co.* (8) As to the pleading; the defendants' alternative plea, commonly known as the rolled up plea, was added to complete the defence. It is a perfectly proper plea and means what it says. [On

(1) (1824) 1 Bing. 403, 409.
(2) (1837) 3 Bing. N. C. 759, 767.
(3) (1836) 2 Bing. N. C. 654.
(4) (1838) 8 Ad. & E. 746, 751, 753.
(5) [1907] 1 K. B. 502, 507, 509.
(6) [1908] 2 K. B. 325n., 327.
(7) [1908] 2 K. B. 309, 317, 319, 323.
(8) [1903] 2 K. B. 100, 109.

this point counsel referred to *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* (1); *Digby* v. *Financial News* (2); *Dakhyl* v. *Labouchere* (3); *Hunt* v. *Star Newspaper Co.* (4)]

Sir Hugh Fraser (with him *Herbert Metcalfe*) for the respondent. The rolled up plea was invented in 1890: *Penrhyn* v. *Licensed Victuallers' Mirror.* (5) It is embarrassing and improper and there is nothing to justify it. It is nothing more than the plea of fair comment, which requires that the allegations of fact must be true in order to substantiate it. This was the opinion of Collins M.R. in *Digby* v. *Financial News* (6), and that opinion has been followed in *Peter Walker & Son* v. *Hodgson* (7), *Lyons* v. *Financial News* (8), and *Maisel* v. *Financial Times* (9): see also *Aga Khan* v. *Times Publishing Co.* (10) The old plea of justification included everything, and there is no ground for departing from the old system of pleading. Upon the merits, having regard to the form of the summing up of the Lord Chief Justice, the second finding of the jury must be construed as being limited to questions of fact. The meaning of the findings as a whole is that the allegations of fact were true and that the comment was unfair. It is obvious that the learned judge was directing the attention of the jury to the libel being divisible into two parts—allegations of fact and expressions of opinion. But he never asked the jury, as he should have done, Are all the words, including the expressions of opinion, true? Nor did he point out to the jury that in order to substantiate the plea of justification they must find that the expressions of opinion as well as the allegations of fact were true. In the circumstances it is impossible to say what the jury regarded as statements of

(1) [1906] 1 K. B. 403, 411.
(2) [1907] 1 K. B. 502, 507, 509.
(3) [1908] 2 K. B. 325.n, 327.
(4) [1908] 2 K. B. 309, 317, 319, 323
(5) (1890) 7 Times L. R. 1.
(6) [1907] 1 K. B. 502, 507.
(7) [1909] 1 K. B. 239, 255.
(8) (1909) 53 S. J. 671.
(9) (C. A.) Unreported. Jan. 13, 1914. Reported in the House of Lords on another question 112 L. T. 953. The judgments of the Court of Appeal are set out in the Appendix to the case in the House of Lords.
(10) (1924) 40 Times L. R. 299.

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fact and what as expressions of opinion. The crucial question was never put to the jury. The Lord Chief Justice ought to have said: If you find everything true there is no occasion for the plea of fair comment. But, instead, he said that certain things were expressions of opinion, and he did not make it clear to the jury that those expressions of opinion must be included in the plea of justification. Therefore, assuming that the verdict in the respondent's favour cannot stand, there ought to be a new trial on the ground of misdirection. There must be a new trial if the question to be determined is not put to the jury in such a way as to satisfy the appellate tribunal that the mind of the jury was really directed to the essential question in the case: *Jones* v. *Spencer*.(1) Assuming misdirection, the appellate tribunal will decline to speculate what the jury would have done if the case had been properly presented to them. Therefore it cannot be said in this case that no substantial wrong or miscarriage has been occasioned by the misdirection: *Bray* v. *Ford*. (2) As to fair comment, to support the plea honest belief in the justice of the comments is not sufficient; there must be a reasonable degree of judgment and moderation: *Wason* v. *Walter* (3); *Campbell* v. *Spottiswoode*. (4) On the question whether the comment was made without malice, the language of the passage complained of shows such an unreasoning prejudice as to amount to malice in law. Language which is extravagant and too violent for the occasion may afford a ground for inferring malice: *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (5); *Spill* v. *Maule*. (6) There is therefore no ground for the view taken by Younger L.J. that there was no evidence to support the finding of the jury that the comment was not fair.

Theodore Mathew in reply referred to Order XXXIX., r. 6.

The House took time for consideration.

(1) (1897) 77 L. T. 536, 538.
(2) [1896] A. C. 44, 48, 50, 52, 55.
(3) (1868) L. R. 4 Q. B. 73, 96.
(4) (1863) 32 L. J. (Q. B.) 185, 202; 3 B. & S. 769, 781.
(5) [1892] 1 Q. B. 431, 444.
(6) (1869) L. R. 4 Ex. 232, 235.

1924. Nov. 21. VISCOUNT CAVE L.C. My Lords, this is an appeal by the defendants in the action from an order of the Court of Appeal in England reversing a judgment of the Lord Chief Justice in their favour and directing judgment to be entered for the plaintiff for 100*l.* and certain costs. [His Lordship stated the facts.] My Lords, I think it is desirable at this point to say that in my opinion this House is not concerned with any question as to the desirability of the use of contraceptives, or as to the propriety of encouraging such use by the circulation of printed matter or in any other way. No such question has been or could be raised or argued in this action, which is founded only upon an alleged libel upon the plaintiff as to the mode in which she has carried on her campaign; and, accordingly, I do not think it would be proper for me to express an opinion upon the wider question. The real questions to be determined on this appeal are, first, what is the meaning and effect of the verdict of the jury; and, secondly, whether there should be a new trial?

My Lords, the answers of the jury to the second and third questions put to them by the trial judge appear at first sight to be inconsistent with one another. The plea of justification —i.e., that the words complained of were true in substance and in fact—means that all those words were true and covers, not only the bare statements of fact contained in the alleged libel, but also "any imputation which the words in their context may be taken to convey": per Collins M.R. in *Digby* v. *Financial News* (1); and from this it has been held to follow that, if on such a plea a verdict is found in the defendant's favour, there is no room for any discussion of the question of fair comment. "The plea of fair comment does not arise if the plea of justification is made good": per Lord Loreburn in *Dakhyl* v. *Labouchere*. (2) But although this may be the ordinary rule, I agree with the Court of Appeal in holding that there is difficulty in applying it to the verdict in the present case. The Lord Chief Justice did undoubtedly, in summing up the case, draw a marked distinction between fact and opinion; and while he carefully and clearly instructed

(1) [1907] 1 K. B. 502, 509. (2) [1908] 2 K. B. 325n., 327.

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the jury that it was their duty to deal under the plea of justification with the "real sting of the matter" and the "real pith and marrow" of the statements made, he does appear to me to have invited them to deal under the category of fair comment with such parts of the alleged libel as consisted of mere expressions of opinion upon the facts alleged and proved. I proceed, therefore, to deal with the verdict upon the assumption that the jury acted upon that principle.

In this view of the matter it is necessary to consider what parts of the paragraph complained of the jury were entitled to treat as containing the "real sting of the matter," or in other words what were the substantive charges made against the plaintiff as distinguished from the opinions expressed upon the conduct so imputed; and it appears to me that upon a careful reading of the alleged libel those charges may be divided into three parts, as follows: (1.) By the first two sentences, which must be read together, the defendants in effect stated that (to quote the interpretation put upon those sentences by the plaintiff in her statement of claim) the plaintiff was taking advantage of the ignorance of the poor to subject them to experiments. By this statement Dr. Sutherland meant, as he told the jury, not that at the plaintiff's clinic surgical experiments were made upon poor persons, but that they were there subjected to a social experiment which was contrary to the laws of nature; and no doubt the jury, to whom it was left to determine the natural meaning of the statement, were satisfied that the statement was reasonably to be understood in that sense. In any case they found this charge, which was plainly a statement of fact, to be true; and passages were quoted to your Lordships from the plaintiff's published works and the evidence in the case which were amply sufficient to entitle the jury so to find. (2.) By the third sentence of the paragraph complained of as a libel the defendants alleged that at the plaintiff's clinic working women were instructed in a mode of contraception which had been described by Professor McIlroy as the most harmful method of which she had had experience. With reference to this allegation the learned judge instructed the jury that in

order to justify it the defendants must prove, not only that Professor McIlroy had used the quoted words with reference to a method of contraception (the use of a check pessary) recommended by the plaintiff at the clinic—as to which there was no question—but also that the method referred to was in fact of a harmful and dangerous nature. This charge, which was also a statement of fact, was found to be true ; and there was undoubtedly evidence upon which the jury could find that the methods recommended by the plaintiff for the prevention of conception might not improbably be the cause of injury to the persons by whom they were used. This was particularly the case with regard to an apparatus called the "gold pin," which was said by several of the witnesses to be calculated to produce abortion. (3.) By the last two sentences of the alleged libel the defendants in effect charged the plaintiff with carrying on her campaign by means of literature not less obscene than that for which Charles Bradlaugh was prosecuted, and of such a nature as to infringe the criminal law which forbids such publications ; and this charge, the most serious of all, was also found by the jury to be true in substance and in fact. Your Lordships' attention was called to passages in the plaintiff's books upon which the defendants had relied as supporting this charge, and those passages appeared to me to be of such a nature as fully to justify the finding of the jury. That all the above charges were treated at the trial as matters of fact to be considered under the plea of justification is clear from the circumstance that towards the end of the arguments counsel for the plaintiff handed to the Lord Chief Justice a note defining the statements of fact contained in the alleged libel in the following terms "(*a*) experiment, (*b*) victims, (*c*) most harmful method, (*d*) crime, (*e*) more serious" ; and the summing up by the learned judge proceeded on these lines.

Then if, as the jury have found, all the above charges were true—if it be true that the plaintiff took advantage of the helplessness of the poor to subject them to experimental processes of a harmful and dangerous character and carried on her campaign by means of obscene publications which

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constituted a breach of the criminal law—what remains in the alleged libel to which the description of " unfair comment " can have been intended by the jury to apply ? Scrutton L.J., in his judgment in the Court of Appeal, pointed to two statements in the paragraph complained of as being statements of opinion upon which a question of fair comment might arise—namely, (1.) the statement referring to " the decent instincts of the poor," and (2.) the expression " monstrous campaign." I think that another expression—namely, that the offence of which Charles Bradlaugh was convicted was " less serious " than that of the plaintiff—may also be regarded as a statement of opinion ; but apart from these three expressions I can find nothing in the alleged libel which the jury were entitled to rank under that category.

Then was there any evidence or other material upon which a reasonable jury could find that, assuming (as it must be assumed) that the charges above enumerated were true in substance and in fact, these expressions of opinion or any of them constituted unfair comment ? This is plainly a question for the Court, which has to determine whether the document is capable in law of being a libel : per Collins M.R. in *McQuire* v. *Western Morning News Co.* (1) I do not think there was any such evidence. With regard to the first of these three statements—namely, the statement that the ordinary decent instincts of the poor are against the practice of using contraceptives—I doubt whether this is properly to be regarded as a comment upon the plaintiff's conduct at all. No doubt it is in a sense an expression of opinion ; but it expresses the opinion of the writer, not as to the mode in which the plaintiff recommends the practice of birth control for adoption, but as to the practice itself. But, even assuming that the sentence contains a reflection upon the plaintiff, I am unable to understand how, having regard to the facts found to be true, the reflection can be said to be unfair. On the other hand, the word " monstrous " is undoubtedly a comment, and, if unfair, might give cause for complaint ; but if, as the jury have found, the campaign in question has been carried out by

(1) [1903] 2 K. B. 100, 111.

means of the circulation of obscene and criminal matter, and if the defendants were justified in so stating, then the addition of the epithet " monstrous " can add nothing to the libel. And a like observation applies to the indication by the writer of his opinion that the plaintiff's offence was more serious than Bradlaugh's. If the substantive charge, that the campaign is obscene and criminal, may justly be made, a description of the same campaign as " monstrous " or " serious " is not a new and separate charge, but a mere shadow of the substantive charge for which a separate justification is not required. Upon this point there is considerable authority. Thus in *Edwards* v. *Bell* (1) Burrough J. said that " as much must be justified as meets the sting of the charge, and if any thing be contained in a charge which does not add to the sting of it, that need not be justified." So in *Morrison* v. *Harmer* (2), where the defendants had charged the plaintiffs with an impudent fraud and had referred to them as " scamps and rascals," it was held that it was sufficient for the plaintiffs to establish the substance of their charge, and that they need not justify the additional words quoted; and Tindal C.J. said: " We cannot . . . . understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority, by which it is determined, that the justification of the truth of the substantial imputation contained in a libel, is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation." And in *Cooper* v. *Lawson* (3) Coleridge J. said: " It would be as much too strong to say that all such comments are to be submitted to the jury; for there are cases, one of which has been put, where the inference is so fair, that, if you prove the fact, you prove the correctness of the comment." It appears to me that the present case falls within the principle of these decisions, and that the epithets " monstrous " and " more serious," which in gravity fall far below the substantive

(1) 1 Bing. 403, 409. (2) 3 Bing. N. C. 759, 767.
(3) 8 Ad. & E. 746, 753.

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charge and add nothing to it, need not be separately justified. If this be so, then there was, as Younger L.J. held, no evidence whatever on which a rational verdict could be found to the effect that the comment was unfair, and the judgment of the Court of Appeal in favour of the plaintiff cannot stand.

There is one further point to be dealt with. It was contended on behalf of the respondent that, assuming that the judgment in her favour cannot stand, there should be a new trial on the ground of misdirection. It was said that the Lord Chief Justice did not in any part of his summing up ask the jury to say whether all the words of the alleged libel were or were not true, and that he so distinguished fact from comment that the jury may have excluded from the plea of justification a substantive part of the libel and dealt with it as comment. Having carefully read the summing up with this point in mind, I do not think that this criticism is justified. The learned judge did indeed leave it to the jury to determine for themselves what parts of the words complained of were statements of fact and what parts were comment; but he invited them more than once to deal under the plea of justification with the real sting of the libel, and ultimately put to them the question whether the words complained of, that is to say, all the words complained of, were true in substance and in fact. It may be that the learned judge might usefully have explained to the jury that if the words complained of were substantially true there was nothing upon which a verdict of unfair comment could be founded, or he might (as at one time he was inclined to do) have withdrawn that issue from the jury; but if he was wrong in this the error was not to the prejudice of the plaintiff. In my view, therefore, a new trial should not be ordered.

For the above reasons I move your Lordships that this appeal be allowed and the cross-appeal dismissed, and that the order of the Court of Appeal be discharged and the judgment of the Lord Chief Justice restored, with costs here and below.

VISCOUNT FINLAY. My Lords, this is an action brought by Mrs. Stopes, the wife of H. V. Roe, against Halliday

Sutherland, the author, and Harding & More, Ld., the publishers of a work containing words alleged to be a libel upon the plaintiff. Sutherland pleaded that the words were true in substance and in fact and also, in the alternative, that they were fair comment on a matter of public interest. For the purposes of this appeal it is agreed that the publishers are to be treated as having raised the same defences.

The case was tried before the Lord Chief Justice with a special jury. In answer to questions put by the Lord Chief Justice the jury found that the words complained of were defamatory of the plaintiff, that they were true in substance and in fact and that they were not fair comment, and they assessed the damages, if any, at 100*l*. Upon these findings the Lord Chief Justice entered judgment for the defendants. On appeal, a majority of the Court of Appeal (Bankes and Scrutton L.JJ.) gave judgment for the plaintiff with 100*l*. damages, while Younger L.J. was of opinion that the appeal should be dismissed.

The plaintiff holds a degree in philosophy given by the University of Munich and has taken an active interest in the subject of birth control. She founded and manages a clinic for birth control at 61 Marlborough Road, Holloway, N., and has written and published several works on the subject. The defendant Sutherland is a doctor of medicine of the University of Edinburgh and is the author of a book entitled "Birth Control: A Statement of Christian Doctrine against the Neo-Malthusians," which contains the words complained of. As set out in the statement of claim they are as follows: [His Lordship set out the passage complained of as a libel.]

The defendant Sutherland pleaded: "(4.) The said words in their natural meaning are true in substance and in fact." Para. 5 of his defence raised the defence of public comment on matters of public interest, and para. 7 was as follows: "(7.) In the alternative, if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same

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are fair comments made in good faith and without malice upon such facts and upon such other matters as are referred to in paragraph 5 hereof, which said facts and other matters are matters of public interest." The defence contained particulars of para. 4 and of paras. 5 and 7. These defences are to be taken to have been also raised by the second defendants.

It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact but also in any comments made therein.

The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.

For a good many years past a practice has prevailed of raising this defence by what has been called the "rolled up plea," but it will be found that this term is a misnomer based on a misconception of the nature of the plea. Such a plea states that the allegations of fact in the libel are true, that they are of public interest, and that the comments upon them contained in the libel were fair. The allegation of truth is confined to the facts averred, and the averment as to the comments is not that they are true but only that they were made in good faith, and that they are fair and do not exceed the proper standard of comment upon such matters.

There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly

stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendent has to prove not only that the facts are truly stated but also that any comments upon them are correct.

The nature and the effect of this defence are well stated and explained by Wessels J.P. in *Van der Hoven* v. *Erasmus* (1) in the Supreme Court of South Africa. I am unable to agree with the view taken upon the subject by the Court of New Zealand in *Norton* v. *Bertling*. (2)

Such a defence on the ground of fair comment will fail if the jury are satisfied that the libel was malicious or that it exceeded the bounds of fair comment.

On the question of fair comment, the law is in my opinion correctly stated by the Master of the Rolls (afterwards Lord Collins) in the case of *McQuire* v. *Western Morning News Co.* (3): "It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to shew that it is a libel—i.e., that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted." In this passage Lord Collins followed on the lines laid down in the judgment of the Court in *Henwood* v. *Harrison*. (4) The judgment of the majority of the Court (Willes, Byles and Brett JJ.) was delivered by Willes J. (Sir James Shaw Willes), and on p. 628 will be found the following passage: "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bona fide without malice are libellous. As Lord Wensleydale said in the same case" (*Parmiter* v. *Coupland* (5)), "'Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander.' It would be abolishing the law of privileged

(1) 1922 T. P. D. 1.
(2) (1910) 29 N. Z. L. R. 1099.
(3) [1903] 2 K. B. 100, 111.
(4) (1872) L. R. 7 C. P. 606.
(5) (1840) 6 M. & W. 105, 108.

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discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant. In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded." There are other authorities to the same effect which are conveniently collected by Mr. Gatley in his work on the law of libel and slander (pp. 364–367).

On consideration of the application for judgment on the findings of the jury, the Lord Chief Justice said (p. 396 of the Appendix, letter E): "Mr. Charles, at the conclusion of the case for the plaintiff, submitted to me that there was no evidence of malice, and invited me in effect to say that upon the defence of fair comment it was not necessary to submit any question to the jury. My own mind inclined in that direction, but upon the whole I thought it was more satisfactory, inasmuch as I thought the matter ought to be wholly before the jury, to leave that question also to the jury, and I decided not to withdraw it." I think there can be no doubt that the Lord Chief Justice was right in so thinking, as it would have been very unsatisfactory to deal with the point raised by Mr. Charles before the facts had been ascertained by verdict. After the verdict the Lord Chief Justice, after hearing argument, entered judgment for the defendants. In stating his decision, the Lord Chief Justice refers to the submission so made by Mr. Charles. That submission was in effect that there was no evidence either of malice or of any excess in the comments, and on this ground I think that the decision of the Lord Chief Justice that judgment should be entered for the defendants was right. I do not, however, think in the very special circumstances of this case that the entry of judgment for the defendants can be supported simply

on the ground of a verdict for the defendants on the plea of justification on the ground of truth. Of course, a clean finding for the defendants on a plea of justification entitles the defendants to judgment. But in the present case when the summing up is looked at it is impossible to treat the finding of the jury as a finding that the whole libel, including comment as well as facts, is true. I read the summing up as a direction to the jury that in considering the justification they were to find whether the statements of facts in the libel were true, while as to any portion of the libel consisting of comment, they were to say whether it was fair comment. The jury found that the facts were correctly stated, but as regards the comment they found that it was not fair. It is therefore, in my judgment, impossible to deal with the case as if there had been a finding for the defendants upon the plea of justification in the ordinary way. The finding was merely that the *facts* had been proved.

On the plea of justification the question which ought to have been left to the jury was whether the libel, comments as well as averments of fact, was true. I cannot find that that question was put. In my opinion the Lord Chief Justice in his summing up divided averments of fact from comments, and it was as regards the former only (averments of fact) that the jury were asked whether they were true. The finding of the jury must be read as if they had said " the averments of fact in the libel, as distinguished from the comments are true." Then in the answer to the third question the jury say that the comment was not fair. It does not, however, in my opinion follow that there should be a new trial on the ground of misdirection. The jury have found that the facts are truly averred. Given these facts, there is nothing on which in point of law the finding that the comment was unfair can be supported. This is a question of law for the Court, and in my opinion it could properly be answered only in one way, and the Lord Chief Justice and Younger L.J. were right in saying that on these findings judgment must be entered for the defendants.

What were the averments of fact in the libel? As

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formulated by counsel for the plaintiff, they will be found in the note of the Lord Chief Justice on p. 415 of the Appendix.

I. Heads (*a*) and (*b*) relate to the sentence in the libel "But owing to their poverty, lack of learning and helplessness, the poor are the natural victims of those who seek to make experiments on their fellows."

II. Head (*c*) relates to the allegation in the libel that at the birth control clinic "working women are instructed in a method of contraception described by Professor McIlroy as the most harmful method of which she had had experience." The jury were rightly told by the Lord Chief Justice that the question for them was whether these words, which were used by Professor McIlroy, were in fact true.

III. Heads (*d*) and (*e*) relate to the following words: "Charles Bradlaugh was condemned to jail for a less serious crime."

I proceed to deal with these three passages.

Heads I. and II. may be conveniently treated together, and they are so dealt with in the summing up. The Lord Chief Justice in his summing up discusses at some length the question whether the term "experiment" may be properly applied to the methods advocated by the plaintiff. He points out that the word may bear either of two different meanings. It may be said that the whole system of what is called Neo-Malthusianism is an experiment or that experiments have been made in particular cases. On this point the Lord Chief Justice quotes Dr. Maurice Abbott-Anderson. He was asked (Appendix 381 F.): "Now can you express an opinion as to the stage to which the science of contraception has attained?" and he answers: "Yes, you see it is all experimental. There is no definite statement made by anybody, anywhere, either by personal experience or in any book, that this or that method is a certain contraceptive." The Lord Chief Justice goes on: "It is all experimental. Now the defendant says: by the natural and ordinary interpretation of this phrase, what is meant is that steps have been taken to bring this new gospel, to apply this great social experiment to the poor, and that that

is bad. They take a step further and say that even if you put a limited meaning upon it—of course it is entirely for you to say what you think these words mean, remembering always the standard is what the reasonable reader would have conveyed to him by those words—they say further: if you take the more restricted meaning of the word 'experiment' something of that sort did go on."

The Lord Chief Justice then refers to the two methods described by the plaintiff. The first of them is the check pessary. He points out that while the plaintiff's witnesses say it is all right, a group of eminent witnesses for the defendants say that if the pessary is not fitted tightly it is useless, while if it is fitted tightly it will interfere with the discharge of secretions, leading to mischief and, it may be, to gangrene and peritonitis. The second method to which he adverts is the gold pin; he points to the evidence that its use promotes conception but causes early abortion.

With regard to the pessary, the jury were told by him that the question for them was whether the statement made about it by Professor McIlroy was correct; this is a question of fact and is covered by their finding of truth. There appears to be no contradiction of the evidence that the gold pin is an abortifacient.

The question whether the plaintiff's methods are experimental and whether experiments are in fact performed are questions of fact and as such have been answered in the affirmative by the jury and they have found that as to the danger that attends the use of the pessary.

I go on to deal with Head III., being the allegation in the libel that the crime of Bradlaugh was less serious than that of the plaintiff.

The conviction of Bradlaugh proceeded on the ground that his book describing and recommending methods of birth control was an obscene libel. The obscenity was simply in describing and recommending such methods of control. It will be found that the plaintiff's books not only advocate such methods but contain what is obscene, whatever view may be taken of such methods.

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I have gone through the allegations made as to matters of fact, but there remain two sentences of the libel which were relied on as expressions of opinion and libellous.

The first was contained in the words " the ordinary decent instincts of the poor are against these practices." This, it is said, was libellous. The plaintiff's contention on this point, when analyzed, comes to this, that these words involve the expression of an opinion that there was something reprehensible in these practices which revolted the instincts of the poor. It appears to me that it is impossible to hold that the bounds of fair comment are exceeded by the expression of an opinion honestly held that such practices are revolting to the healthy instincts of human nature. There is an old and widespread aversion to such methods on this ground. This sentiment was voiced by the historian of the Decline and Fall of the Roman Empire when in his fortieth chapter he referred to such practices as " detestable precautions."

The other passage relied on by the plaintiff for this purpose was as follows: " It is truly amazing that this monstrous campaign of birth control should be tolerated by the Home Secretary." It has been asserted that the epithet " monstrous " passed the limits of fair criticism. Whether the particular epithet is too strong or not must depend upon the nature of the facts upon which the defendant was commenting—namely, the clinic itself and the plaintiff's publications in support of it. The work for the publication of which Bradlaugh was sentenced was, as I have pointed out, confined to the inculcation of methods of birth control. The plaintiff has done what Bradlaugh did, but she has done something more. We were referred in the course of the argument to certain passages in the books published by the plaintiff of such a nature that they were not read aloud. These books have a very large circulation, and for my part I cannot doubt that they are calculated to have a most deplorable effect upon the young of both sexes. It would be absurd to say that the epithet " monstrous " as applied to such a " campaign " passes the bounds of fair criticism, or that it was not fair comment to use language implying that such

passages as those to which I have referred aggravate the criminality of the obscene libel.

A great deal has been said about the sincerity with which the plaintiff holds the doctrines which she teaches and carries into practice. One of the plaintiff's books is entitled "A New Gospel to all Peoples." In the prefatory note the author claims that this gospel was the result of inspiration, and that she was merely the vehicle for conveying a message from a higher power. This message contains a foul charge against "certain ministers of the Church" with regard to the instruction given by them to the young committed to their charge. Her sincerity is not the question. If an obscene libel is published, the fact that it forms part of a campaign prosecuted with all sincerity affords no defence. The right of free speech is claimed for the advocates of the new gospel, but they must submit to have their tenets and their practices criticized. A French savant is reported to have said that if he had been consulted at the time of the creation of the world he could have given some hints of great value; and this appears to some extent to be the attitude of the plaintiff.

I think it is unfortunate that the plaintiff uses in connection with her clinic the title "doctor." She is a Doctor of Philosophy, but the use of the term "doctor" must lead a great many of the people who frequent the clinic to believe that the person in charge of it is a Doctor of Medicine. This is a common use of the term "doctor" in ordinary conversation, and where a "doctor" is found in charge of a clinic it would naturally be supposed that he is a Doctor of Medicine. Any person who is in fact a Doctor of Medicine would, of course, be subject to the disciplinary action of the Medical Council.

I desire to add some comments upon the manner in which the Lord Chief Justice dealt with the facts of the case in their broader aspects. He begins this part of his summing up by making some observations as to the manner in which, in dealing with the young, sex problems should be handled (Appendix, 376 et seq.). These observations appear to me to be characterized by knowledge of the world and by sound common sense. Some instruction on such matters there must be, but it should

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be communicated by a father or mother or some person in loco parentis to the boy or girl individually, and not in classes. The Lord Chief Justice animadverts upon the mischief that might result from such teaching if indiscriminately given, and adopts the canon laid down in the course of the evidence—"sex teaching, yes, but in cold scientific language, not mixing up physiology with emotion, not teaching such truths as need to be taught in the language of adjectives and rhetoric, but with austerity, with coldness, stating the facts and no more." There should be nothing, he says, in the shape of "romantic emotional rhetorical rhapsody." I think few will be found to say that these canons have been observed by the plaintiff in her treatment of these very delicate questions.

A passage at the end of the summing up seems to me to go to the root of the matter (Appendix, p. 389): "Now what is said here? Dr. Sutherland says that this is as bad as the Bradlaugh pamphlet and worse, and he says that in two respects. You have passages, he says, in these books to which no parallel can be found in the pamphlet published by Mr. Bradlaugh—no parallel at all. Your attention has been directed to certain passages"—the Lord Chief Justice says he is not going to read them, and proceeds: "But just consider. The argument is that these are books which may be exposed for public sale indiscriminately, in great quantities, in order to fulfil a mission. The mission is variously described at various points of the argument. The teaching about sex is mixed up with the teaching about contraceptives. The teaching about contraceptives is mixed up with other matter. But it is all said to have been done in pursuance of a mission. Now you may think that, however desirable it may be that proper teaching about sex should be given properly and privately to young people, it is a calamity that books of this kind should be published broadcast. You may think so, or you may not think so, but whatever view you take about that question, you may ask yourselves this question: What legitimate purpose can be fulfilled by the insertion in these books—I do not reread the passages, but I remind you of them, and I must use words which will remind you of them.

What can be the legitimate purpose of the insertion in these books, to be read by married and unmarried, young and old persons of both sexes, whoever can find, in the one case, 6*s*. and in the other case 3*s*. 6*d*., passages which describe the male organ in quiescence and in erection, which describe the encouragement which a man should give to a woman and a woman should give to a man before the act of intercourse is entered upon, and which analyse the successive phases and sensations of the act of sexual intercourse ? Obscene ! . . . . You know the passages, you know the context, you know the circulation of these books ; can you say that they fall short of being obscene publications ? "

I must add a few observations as to the proceedings in the Court of Appeal.

Bankes L.J. states his reasons towards the close of his judgment on p. 422 of the Appendix. What he says comes to this, that the Chief Justice left the plea of justification to the jury simply so far as averments of fact are concerned, and therefore their answers cannot be read as applying to comment. As I have already pointed out, that is perfectly true, but the Lord Justice does not deal with the question whether, when all the averments of fact are found to be true, there remains anything in the shape of comment as to which it could be said that there was evidence fit to be left to the jury to show that the comment was unfair.

I pass to the judgment of Scrutton L.J. I agree with him in thinking that the Lord Chief Justice took the opinion of the jury on the question of truth merely upon the averments of fact in the plea of justification. With regard to what I think is the real point of the case, the Lord Justice says this (p. 427) : " There was some faint suggestion before us that when you had ascertained what were really the allegations of fact in the libel, it was not possible for a reasonable jury to find that the comments on those facts were unfair. This point was not taken at the trial, and I think it must fail here." The point was taken at the trial by Mr. Charles, as appears from what was said by the Lord Chief Justice in a passage to which I have already referred (Appendix, p. 396 E), and whatever the

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merits of the argument I think it sufficiently appears from what the Lord Justice says that the point was taken in the Court of Appeal. The Lord Justice goes on to point out that the standard of what is considered depravity varies from time to time and that the standard may not be the same in 1923 as in 1877. "From this point of view," he says at p. 428, "there was a wide field to be covered by the questions as to fair comment, to which the jury might address their minds as the tribunal representing ordinary current opinion at the time." But after all said and done, the question really lies in a very small compass. It is this: Could any reasonable man say that on the facts found, which are really few and simple, the comments were excessive?

The reason on which Younger L.J. bases his conclusion in favour of the defendants is this (Appendix, 433 C): "On what I conceive to be the narrowest permissible view of the answer to the second question, the defendants have, I think, justified to such extent as is required of them in such a case as this: the charge in respect of these matters of comment, in my judgment, on the principle laid down in such cases as *Morrison* v. *Harmer* (1) has been substantially met and answered in that justification." It comes to this, that when the facts are found as they were here, there is no ground on which it can with any reason be said that the limits of fair comment were exceeded.

My Lords, I agree with the conclusion reached by the Lord Chief Justice and by Younger L.J. I think that the appeal should be allowed with costs here and below and that judgment should be entered for the appellants.

LORD SHAW OF DUNFERMLINE. My Lords, the respondent brought this suit for damages caused to her by an alleged libel appearing in a book entitled "Birth Control," of which the appellant, Sutherland, was the author, and the other appellants, Harding and More, Ld., were the printers and publishers.

The words of the alleged libel have been quoted in extenso by my noble and learned friend on the Woolsack. As to

(1) 3 Bing. N. C. 759.

the merits or otherwise of the allegations themselves, or the theories or practices with which the books of the respondent deal, or as to their scientific accuracy or inaccuracy, or the social or moral advantages or disadvantages which would follow from their adoption—upon all of these things, my Lords, I must resolutely decline to express any opinion whatsoever. I make no judgment upon the views of others: but, speaking for myself, in thus declining to enter upon a matter of deep contest in the medical and sociological and moral spheres, or even to be induced to express or indicate any view or inclination of mind thereon, I am simply paying the respect which is due to the correct ambit of a purely judicial task. This appeal presents questions of law, and in my opinion must accordingly on that footing alone be disposed of.

To make written language libellous, or spoken language slanderous, it is fundamental and essential that they be of and concerning a person, be untrue in substance and in fact, and be defamatory in nature. There is no exception to these rules, whether the language be the language stating fact or stating opinion. When facts are stated they can be justified as being, although defamatory and of and concerning the plaintiff, yet true; when opinions are stated they can be justified on precisely the same grounds—namely, that although of and concerning the plaintiff and defamatory, yet they also are true. In the next place, when in the course of the statement of defamatory matter both facts and opinions are set forth, it is upon similar principles open to a defendant to say that the entirety, both fact and opinion, is true in substance and in fact. That was the present case. It was so pleaded and the trial was conducted by both parties upon that comprehensive defence. In every one of these cases, if the truth of the libel is affirmed by the jury the case is at an end. There is no room for introducing fair comment or of perplexing the jury with the consideration of such a plea, when the defendant has justified the truth of all he has said, whether in stating fact or expressing opinion.

There are two qualifications which must be made upon this absolute rule. In the first place, truth must not be stated

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without being fully stated; that is to say, without that context in the case of a libel, and without those circumstances in the case of a slander, which would put a different complexion upon matter which is libellous or slanderous standing by itself, and would possibly or probably destroy altogether its character as such. In the second place, a statement of fact or of opinion which consists in the raking up of a long-buried past may, without an explanation (and, in cases which are conceivable, even with an explanation), be libellous or slanderous if written or uttered in such circumstances as to suggest that a taint upon character and conduct still subsists, and that the plaintiff is accordingly held up to ridicule, reprobation and contempt.

Subject to these qualifications, the rule as to justification in fact being exclusive, as a plea, of a plea of fair comment, in the sense of making the latter unnecessary, is, in my opinion, an absolute rule.

I recognize to the full the great difficulties in which the Lord Chief Justice of England was put in charging the jury, on account of the state of the authorities upon this question of procedure. It is further true that, while the defence of Dr. Sutherland did fully and comprehensively state of the entire libel that it was true in substance and in fact, both it and the defence of the publishers alternatively set forth a defence of "fair and bona fide comment made and published without malice on matters of public interest." And it is interesting further to observe—the Bar equally with the Bench being apparently perturbed by the state of the authorities—that the "rolled up plea" in defence was taken. It is thus expressed: "(7.) In the alternative"—that is, be it observed, an alternative or supposed alternative to two separate and distinct defences of the words being true in substance and in fact, and of the words being fair and bona fide comment—"In the alternative, if, which is denied, the said words bore or were understood to bear the meanings alleged, this defendant says that in so far as the said words consist of allegations of fact the same are true in substance and in fact and in so far as the said words consist of expressions of opinion the same are fair comments made in good faith and without malice upon

such facts and upon such other matters as are referred to in paragraph 5 hereof, which said facts and other matters are matters of public interest." Such a statement of defence, my Lords, arising not unnaturally from the state of the authorities to which I have alluded, is sheer surplusage, in view of the items of defence separately and articulately stated in that defence. It is, however, the "rolled up plea," and in a little I shall consider what that means.

In those circumstances it becomes imperative and crucial to consider the course of the trial.

Much, my Lords, was the subject of discussion as to the scope of fair comment in this case. In my opinion, all this was unnecessary, because, whether fact or opinion, the trial was conducted most frankly and courageously and, I may add, unwaveringly on the part of Mr. Serjeant Sullivan for the defendants, on the footing that the libel in its entirety and in all of its contents was true in substance and in fact, whether statement, inference, or opinion. And it was met in a similar spirit by Mr. Hastings for the plaintiff.

I should explain further that in a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true. A counsel does not lightly accept a burden of that character; because the result is that, if it fail, the damages are in the ordinary case very substantially increased—the slander or libel being accentuated and continued in the proceedings at the trial itself. But when such a defence is undertaken in its entirety, and prevails, then it does so in such a way as to leave nothing in the libel standing, and no further question as to comment to be considered.

We had at your Lordships' Bar for some days a most able and exhaustive discussion of the subject of what is known as the "rolled up plea." In *Walker & Son* v. *Hodgson* (1) Vaughan Williams L.J. notes the origin of this plea: "This form of pleading," says he, "which I always think very indefinite and embarrassing, has, however, been adopted and sanctioned

(1) [1909] 1 K. B. 239, 247.

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ever since the decision of Mathew and Grantham JJ. in *Penrhyn* v. *Licensed Victuallers' Mirror* (1), and must now be accepted as proper pleading." The *Penrhyn* case contains the pleading thus: "In so far as they consist of allegations of fact the said words are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are a matter of public interest." Over and over again that plea has been repeated, until a stage has arrived when its meaning in plain English has been subjected by the Courts in England to a construction apparently unwarranted by its language and certainly productive of confusion in practice.

A very recent illustration may verify this. In *Aga Khan* v. *Times Publishing Co.* (2) Scrutton L.J., in the course of his judgment, said: "The two pleas (justification and fair comment) had been rolled into one, and there had been a great difference of opinion in the Court of Appeal on the question whether or not it was a plea of justification and fair comment or of fair comment only. The words, 'In so far as the words consist of allegations of fact, the said words are in their natural and ordinary meaning true in substance and in fact,' by themselves seemed to his Lordship clearly to state a plea of justification, because they justified the words in their natural and ordinary meaning, and it was the natural and ordinary meaning which conveyed the imputation of a defamatory character, and if he (Lord Justice Scrutton) were left to himself, he, personally, would direct particulars to be given of the facts which were alleged to be true and of the comments which were said to be fair."

If I also were left to myself I should respectfully agree with the opinion and suggested direction stated in this last paragraph. Indeed, I go so far as to believe that a similar opinion must have underlain certain observations of Lord Loreburn L.C. in *Dakhyl* v. *Labouchere.* (3) And I must add that if the rolled up plea were interpreted and worked in

(1) 7 Times L. R. 1. (2) 40 Times L. R. 299, 300.
(3) [1908] 2 K. B. 325n.

this correct and sensible manner, then I should see nothing wrong with it. I must, however, make my best endeavour to interpret the true result of the authorities as they stand; and I cannot but be moved by the views of my noble and learned friends who have had a very wide experience upon what is after all purely a question of English practice.

Another case, *Digby* v. *Financial News* (1), must be mentioned. It went very far. The Master of the Rolls (Sir Richard Henn Collins) put it thus: "When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel." So far so good; but the learned judge proceeds: "This plea"—that is, the rolled up plea already cited—"does not purport to be a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort, but is a plea intended to raise a totally different defence, that of fair comment." Cozens-Hardy L.J. treats the defence as having "carefully abstained from placing on the record a plea of justification."

I think that error is apt to arise from the manner in which the word "justification" is used in regard to the composite plea. If it is meant to apply to justification simpliciter, that is to say to the whole libel, then it is undoubtedly sound to say that the rolled up plea does not cover it. But I venture the opinion that the rolled up plea never did profess a general justification. That plea is specifically limited. It means "Quoad facts—true; quoad comments—fair." No one denies that if a defendant puts such a plea of specifically limited justification in alone, as a separate and articulate plea standing by itself, he will be entitled to carry on the case to judgment on the footing of being allowed to prove it. But when he has added to that another plea, which might also have been separately stated and allowed to proof—to the effect that in so far as opinions were expressed they were fair comment, then the law (in which I reluctantly acquiesce) is that the combination of these two defences together in what has been called a rolled up plea must be taken as a plea of fair comment

(1) [1907] 1 K. B. 502, 507, 510.

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only : the partial justification averred in it is not the subject of probation—that is rolled out : and finally the case is conducted solely on the footing that the facts are assumed to be true. Courts and practitioners will no doubt definitely act upon this footing from this time forward.

I have thought it right to deal with this topic out of respect to the judgments of the Courts below and to the careful arguments at the Bar of the House.

But I must add that although this fair comment plea has proved an awkward cross-current in the case, it is not and never was the main stream of it. For I repeat that the case was pleaded and fought to judgment upon the separately stated issue of complete justification.

In the ordinary case justification of a libel is pleaded simpliciter et generaliter, for the simple reason (1.) that there were no opinions in it, but only allegations of fact ; or (2.), as in this case, that both opinions and allegations of fact were true ; or (3.), also as in this case, that the opinions followed quite accurately from the facts ; they were but the shadow of these, and introduced no matter which by itself would have been actionable. Once that justification is established, the verdict must be applied for the defendant.

But a justification need not be to the whole, but may be to a part. If a man says that a certain neighbour of his was guilty of manslaughter and was also a thief, it is perfectly open to take a plea in justification of either charge only.

In *Clarke* v. *Taylor* (1), Tindal C.J. said : "There can be no doubt that a defendant may justify part only of a libel containing several distinct charges. . . . . But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted would, by itself, form a substantive ground of an action of libel. I cannot say that it is of that description."

It remains to be considered what are the conditions and breadth of a plea of justification on the ground of truth. The

(1) 2 Bing. N. C. 654, 664.

plea must not be considered in a meticulous sense. It is that the words employed were true in substance and in fact. I view with great satisfaction the charge of the Lord Chief Justice when he made this point perfectly clear to the jury, that all that was required to affirm that plea was that the jury should be satisfied that the sting of the libel or, if there were more than one, the stings of the libel should be made out. To which I may add that there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it. If I write that the defendant on March 6 took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that in my opinion he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable but from the harness room, and that he did not sell it the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail.

In the second place, however, the allegation of fact must tell the whole story. If, for instance, in the illustration given, the facts as elicited show what my writing had not disclosed—namely, that the defendant had a saddle of his own lying in my harness room, and that he took by mistake mine away instead of his own and, still labouring under that mistake, sold it—then the jury would properly declare that the libel was not justified on the double ground that there were facts completely explaining in a non-criminal sense anything that was done, and the jury would disaffirm the truth of the libel because, although meticulously true in fact, it was false in substance.

Then, as to the breadth of the justification. When a plea of truth in substance and in fact is made it affirms not only in the sense I have mentioned the facts, but it affirms all that attaches to them as their natural and reasonable meaning. I think the charge of the Lord Chief Justice was correct upon that aspect of the case also. This point as to the breadth of

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the justification is an essential matter to be regarded where the "rolled up plea" is taken, because that "rolled up plea" by law assumes the truth of the facts in the libel and quoad opinion pleads a fair comment as to that. The assumption as to the facts being true must similarly be interpreted by the breadth to which I have referred—namely, that the facts, whether justified as true or assumed to be true, carry with them all that these facts reasonably and naturally imply. And secondly, the point as to fair comment with regard to opinion is only reached when there is separate matter in the words used—separate matter of expressed opinion which goes beyond the natural meaning attaching to the facts, but which for all that may be held perfectly within the right of a free citizen, and not to contain any separate actionable matter.

It is satisfactory to know that this at least is long and well settled. In *Cooper* v. *Lawson* (1), a case decided nearly eighty years ago, it was held that one observation with which the libel concluded, "not being a mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and therefore that, on trial of the above issue, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation, that the plaintiff had been hired, was a fair comment." Coleridge J. remarked that "there are cases, one of which has been put, where the inference is so fair, that, if you prove the fact, you prove the correctness of the comment. But this was not such a case. The comment introduced an additional fact, and then it was for the jury to say whether that was fairly done, or not," and Lord Denman C.J. said: "A comment may introduce independent facts, a justification of which is necessary. The plea is perfectly good, justifying the libel partly as the report of proceedings before a Court, partly as stating that which is in itself true, and partly as giving a fair and bonâ fide commentary on the proceedings stated. Now a comment may be the mere shadow of the previous imputation; but, if it infers a new fact, the defendant must abide by that inference of

(1) 8 Ad. & E. 746, 753.

fact, and the fairness of the comment must be decided upon by a jury."

In *Clarke* v. *Taylor*, already cited, Vaughan J. said (1): "The point is whether any distinct act of criminality imputed to the plaintiff has been left unjustified"; and Bosanquet J. said: "Under the general issue the jury had to consider whether it" (the libel charging the plaintiff with having acted in a great swindling concern at Manchester) "amounted to such a charge or not. The jury have found the justification to be proved, and that justification includes everything material in the charge." *Clarke* v. *Taylor* (1) is very important, as undoubtedly the swindling transactions which were libelled as having taken place at Manchester were also in a separate part of the libel said or implied to have been continued at Leeds. This difference of locus, however, was held not to be indicative of a swindling transaction separately carried out at Leeds, but the Court—a very powerful Court—considered that the gist of the matter was in truth the charge of swindling at Manchester, with a suggestion that there might have been a few days before a similar practice at Leeds. The sting of the substantive libel having been established as applicable to Manchester and the jury having found for the defendants on that part of the libel applicable to Manchester which was justified, the Court refused to enter a verdict for the plaintiff on the passage not justified—namely, that applicable to the preliminary visit to Leeds. I venture to think that the case of *Clarke* v. *Taylor* (1) is of the very highest authority for showing that in libel cases a view meticulously taken, as I have mentioned, of the words of a libel is not sought for, but the opinion of the jury is accepted as conclusive and final on justification if it applies truly to the substantial matter, criminal, nefarious, or contemptible, which the libel as a whole did affirm.

But in truth, my Lords, one cannot but see that in numerous cases this defence of fair comment when taken is reached too soon. If the facts alleged be substantially true and nothing is said in comment which adds to the sting thereof or produces

(1) 2 Bing. N. C. 666, 668.

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separate libellous matter, then in all such cases the plea of fair comment should never be reached at all.

I purposely refrain, my Lords, from much of the law as developed more particularly in English authorities as to what is relevant or required to establish a plea of fair comment. The law upon that subject will, no doubt, demand early review. But I refrain because in my opinion the point of fair comment was never reached, or ought never to have been reached in this case. The Lord Chief Justice did make a most proper attempt to present the issues of fact alleged to be raised by the libel separately and distinctly to the jury. He asked what those were, putting the question to Mr. Hastings, the experienced counsel for the plaintiff, and having received his items and tabulated these he charged the jury upon all of them; and, so charged, the jury found that all of them were justified. It is now pleaded, however, that one particular was not put separately to the jury—namely, that the facts being as alleged, the conduct of the plaintiff was monstrous. I think such pleading comes too late; it is not, in my opinion, open to a party so acting to complain because some other item was not dealt with. But quite apart from that, it is to be noted that one of the facts affirmed by the jury was that the plaintiff had published criminal matter, that is to say, obscene libels. The whole of this part of the pleading seems to me an afterthought and to be without warrant. In the first place, the Lord Chief Justice was not asked to put separately to the jury on the issue of justification in fact whether the conduct was monstrous. In the second place, if he had been so asked he could have said most properly to the jury that if they have found the criminal action in the obscenity of the libels as just alluded to, they need not trouble as to its being monstrous, for that, of course, would reasonably and naturally follow from their opinion upon the first point.

I have to confess accordingly that while the Lord Chief Justice, confronted with conflicting authorities, was placed in a position of difficulty, yet in my opinion he would have been warranted in stating broadly that if the justification in its entirety of all the libel were proved the jury need not trouble

about fair comment. I think that that should have been done. The case having been, however, left to them as if fair comment still remained in it, the jury—also manifestly in doubt—while affirming the truth of the libel as a whole have found unfair comment and given a slender award of damages.

My difficulty in the case really arises upon the point of whether in such circumstances a new trial should be ordered. I think that the jury ought to have had the point more plainly put to them, that if the facts and all that they reasonably implied were found true, then their consideration of the fair comment plea became unnecessary. I am much relieved upon this subject by these two considerations: First, of the view of the Lord Chief Justice in applying the verdict. When confronted with these manifestly inconsistent verdicts of the jury the Lord Chief Justice without difficulty affirmed, and in my opinion rightly affirmed, the law that once a verdict had been found that the libel was true in substance and in fact, no room was left for any fair comment. It may be asked, Why then was fair comment put to the jury? The reason why it was put to the jury was that, suppose the verdict of justification had been negatived, or had only been affirmed in part, then, but then alone, the plea of fair comment would have had to be considered. But that was not so. The plea of justification in its entirety succeeded, and I think the learned Lord Chief Justice showed his true opinion—one which I respectfully think was right in law—and adopted the only logical course open to him in the circumstances by applying the entirety of the verdict in favour of the defendant. "I do not say," says Patteson J. in *Cooper* v. *Lawson* (1), "I do not say that, in all cases where an alleged libel consists partly of comment, it should be left to the jury to say whether the comment is fair, because, if, as the Attorney-General has put it, the words were, 'he has murdered his father, and therefore is a disgrace to human nature,' it would be ridiculous to ask whether the observation was or was not a fair comment." Similarly in the present case the opinion expressed in the article to the effect that the plaintiff's conduct was

(1) 8 Ad. & E. 752.

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criminal as described puts it out of the question to say that a jury so affirming could yet give damages for calling such conduct monstrous. The verdict accordingly in my view was properly applied.

But there is a further and to my mind a cogent reason why a new trial should not be granted. From what I have just observed it could only be granted on the ground of technique. For it is manifest that the real struggle between the parties was as to the truth of the charges made. The learned counsel for both parties put that by their addresses plainly before the jury, and by the verdict of justification I think that issue was in all its breadth settled on the affirmance of justification. What remains, namely, as to unfair comment should not have arisen and, in my opinion, cannot arise unless your Lordships were of opinion that there has been a gross miscarriage of justice. The jury—on a point of fair comment, which was logically out of the case after the affirmance of justification—have given a verdict which drops away altogether on a true application of their verdict on the main struggle and issue of the case. As Lord Herschell expressed it in *Jones* v. *Spencer* (1): "I think that the hesitation of a Court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine."

Furthermore, I am of opinion that in this case Order XXXIX., r. 6, plainly applies to the effect that "a new trial shall not be granted on the ground of misdirection . . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned." I really cannot affirm that such a wrong was caused. To express the opinion that the conduct which the jury affirmed was monstrous

(1) 77 L. T. 536, 538.

seems to me not a separate finding of opinion at all, but a natural consequence.

On these grounds I accordingly agree that the dissent of Lord Blanesburgh (then Younger L.J.) was sound, that the application of the verdict by the Lord Chief Justice was also sound, that that application should be affirmed and the appeal allowed.

LORD WRENBURY. My Lords, the question of birth control is a question which has long engaged, and in the last fifteen or twenty years has, I believe, increasingly engaged, the attention of many thoughtful minds. From 1913 to 1916 the National Birth Rate Commission included the investigation of this subject in its labours. In 1916 it reported to Mr. Walter Long (afterwards Lord Long of Wraxall), then President of the Local Government Board. The Commission was subsequently reconstituted, and in the year 1918 took a mass of evidence upon, amongst other things, such questions as are dealt with in the plaintiff's books. The then Bishop of Birmingham was chairman and many eminent persons of both sexes were members of the Commission. Amongst them was the plaintiff, Dr. Marie C. Stopes. The Commission made a report in 1920. From the Times newspaper of November 8 I have learned that the Birth Control Committee of this National Birth Rate Commission met this year on November 7, under the presidency of the Bishop of Winchester, when Lord Dawson of Penn and others gave evidence. I mention these facts for the purpose of emphasizing at the outset that the question of birth control is a question of grave —of very grave—importance. To parents or prospective parents it is a question of personal importance. To others, and particularly to those who work among the poor, it is of public importance. To those who have at heart the welfare of the nation it is of national importance. There are cases in which the health and happiness of the woman are impaired by too rapid successions of conception. There are cases in which the parents' means do not allow of the proper maintenance, education and advancement of more than a limited

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number of children. There are cases in which the mental or bodily health of the parents forbids or ought to forbid the procreation of defective children. There are those who think that in none of these cases ought control to be exercised. There are those who think otherwise. I express of course no opinion at all as to which are right and which are wrong. But so strong are the feelings of the one side and of the other that hard language may perhaps scarcely create surprise. Whether the language oversteps the bounds and falls into the territory of libel is for a jury to decide.

In many places, and indeed throughout the country I believe, there have been established children's welfare clinics, to which mothers are invited to bring their babies to receive advice on all matters in regard to their management, such as nutrition, cleanliness, infantile maladies and the like. At such clinics the opportunity arises of helping the mothers (who are poor women) with advice, not only as to their babies but as to the question of birth control, which to many of them is a question of vital importance, but as to which they have neither the knowledge nor the means of acquiring the knowledge which more wealthy women obtain from their medical advisers. There are those who think that to extend the work of the clinics so as to include such advice to poor women is upon personal and upon public and upon national grounds right. Dr. Marie C. Stopes, the plaintiff in this action, is a lady who is of that opinion. In order to give poor working women such information as I have indicated, she opened a clinic in Marlborough Road, in the East End of London. She established and maintained it and provided there the services of a fully trained and certificated nurse, all entirely at her own expense. She also wrote certain books relating to birth control, and a very large number of them have been sold to the public. This is a very short statement of the facts as they stood at the time of the publication of the alleged libel upon which this action is brought. Upon the question whether birth control is desirable and legitimate or not I express, of course, no opinion at all. It is not material to do so. My purpose in that which precedes is to emphasize the gravity of

the matter and to indicate the nature of the subject with which I have to do.

The substance and gist of the alleged libel was that the plaintiff had exposed the poor to experiments, of which the poor, owing to their poverty, lack of learning and helplessness, were the natural victims, and had opened a birth control clinic where working women were instructed in a method of contraception described by Professor McIlroy as "the most harmful method of which I have had experience," and had carried on a monstrous campaign of birth control, thus committing a crime more serious than that for which Charles Bradlaugh was condemned to jail.

The alleged libel described the plaintiff as "a woman who is a Doctor of German Philosophy (Munich)." This was true. But she was also a Doctor of Science of London University, a Fellow of the University College of London, a Fellow of the Geological Society, a Fellow of the Royal Society of Literature of London, and a Fellow of the Linnæan Society of London. It may be—I do not know, but it may be—that the jury thought that to describe her as "a woman who is a Doctor of German Philosophy" showed an animus against her which they did not approve.

My Lords, I leave it to others much more conversant than I am with actions for libel to deal with the question of that which is called the "rolled up plea." All that I have to say upon it is this: a libel may and generally does contain both statements of fact and statements of opinion. If the jury are properly directed by the judge and if there is evidence to support their findings they and they alone are the absolute masters of the situation. It is for the jury to say which of the statements are statements of fact and which are statements of opinion, and to say whether those which they find to be statements of fact are true and if they find the facts to be true then whether those which they find to be statements of opinion are fair comment. The pleadings ought to be in such form as to raise all those questions or all such of them as the parties desire to put in issue. The judge ought to direct the jury as to each of them.

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The parties are entitled to have the findings of the jury upon each of them. In the present case, paras. 4, 5 and 7 of the defence raised all these questions and the parties were entitled to have the findings of the jury upon each one of them after proper directions from the judge in the matter. The first point, then, is to see what directions they received.

I turn to the summing up of the Lord Chief Justice to see whether he directed the jury upon all of them. I think he did. I agree that there is room for criticism of the summing up in this respect. I should have been glad to find the duty of the jury to discriminate fact and opinion more clearly stated. But I think there is enough. For instance, the Lord Chief Justice, at p. 374 of the Appendix, says this : " They say two things and they say them still ; and these are the real issues in this case. They say : so far as statements of fact in what is complained of are concerned, those statements of fact are true statements. So far as regards what is expression of opinion, that expression of opinion is fair comment. Now in order that fair comment may be the issue, the matter upon which the comment is written must be a matter of public interest. And so, apart from the initial question whether these words were defamatory, and defamatory of the plaintiff, the questions which remain are, so far as statement is concerned, was the statement true ? And so far as comment is concerned, was the comment fair ? " Again, at p. 375 : " So you have to consider first of all under this head, what are the parts of those words complained of which are really statements of fact, and having made up your mind upon that point, you proceed then to consider whether the real sting is or is not made good. Then for the rest you may think that—of course, it will be a matter entirely for you—a large part of that which is complained of in the defence is fair comment." Further, at p. 376 he speaks of fair comment as a structure built upon a foundation of truth—thus discriminating between the facts which are the foundation and the comment which is the structure built upon it, and he goes on to say : " You want the two ingredients, true statement of fact, and upon the statement of fact comment which a reasonably fair-minded man might

make, whether you agree with him or whether you profoundly disagree with him." Again, at p. 387 he says, "There are expressions of opinion hitherto, but now it becomes an argument winding up with what you will have to determine—you will probably think it is, but that, again, is a matter entirely for you—a statement of fact." And further down: "Taking the whole thing together he [the defendant] says 'I call this a monstrous campaign.' You may or may not think he is right but that is not the question. The question is: Within the wide words, the large words which I have read to you, is it such a comment as may be fairly made in the sense that it may be the honest expression of a view strongly held?" And when approaching the close of the winding up and after stating the questions which he left to the jury, he says to them, "If you think that the statements were true and the comment was fair, there will be no question of damages at all."

There is to be found in the above, I think, a sufficient direction.

In the result the Lord Chief Justice left to the jury four questions, and those four questions with the answers which the jury gave are as follows:—

1. Were the words complained of defamatory of the plaintiff?—Yes.
2. Were they true in substance and in fact?—Yes.
3. Were they fair comment?—No.
4. Damages, if any—100*l.*

It has been contended before your Lordships that the second answer was a complete affirmation of justification, and that once that answer was given there was no room for the answer which followed—namely, No. 3. I cannot so read the questions and answers. I agree that No. 2 if it stood alone might be a complete acceptance of the plea of justification, but it does not stand alone.

I ask myself first—What as matter of construction is the meaning of the words of the Lord Chief Justice as found in the questions? If the second question meant "Are the statements both of fact and of opinion true?" there was no

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room for the third question. The answer to the second question would have covered everything. It cannot be that it covered everything, for the Lord Chief Justice goes on to ask: "Were they fair comment?" As matter of construction I cannot stop, so to speak, in the middle of the sentence. To construe the document I must read the whole document, and reading the whole, I can give effect to it only by saying that No. 2 means, were the words so far as you find them to be statements of fact true, and No. 3 means were the words so far as you find them to be statements of opinion fair comment. Again, reading the questions and answers together, I look to find the meaning of the jury. The observations are the same as before. Their answer to No. 2 must mean we find the statements of fact to be true, but to No. 3 we answer that the statements of opinion are not fair comment.

If this be right it remains to consider whether there was evidence upon which the jury could find as they did that the comment was not fair.

Before referring in detail to the evidence, I pause to consider what were the subjects to which the evidence was directed. They were, in substance, two—namely, first, the methods which the plaintiff recommended to prevent conception, and secondly, the steps which she took to spread knowledge of those methods and in particular the contents of the publications which she wrote and sold. The former it was contended were harmful, and were so pursued as to victimize poor and helpless people. The latter it was contended were obscene.

It was not said and could not be said that the description and discussion of the construction, functions and control of any organ of the human body is necessarily obscene. If the description and discussion were in a medical treatise it would be impossible to say it was obscene. In literature intended for the general public it may or may not be obscene. It depends upon the manner of treatment. The subject matter is not obscene, the method of dealing with the subject matter may be obscene. Whether it is obscene or not is matter of opinion, or at any rate the jury may hold it to be matter of opinion. In any case it is matter for them to decide, and by

their answer to the third question they have, I think, answered the question in the negative.

There are some parts of the human body as to which it is matter of no great moment to any man or woman whether he or she has or has not knowledge of their construction, their function, or their control. A man or a woman may go equally well through life, even if he or she knows little or nothing of the structure, functions or control of the liver, the kidneys, or the heart, or has never so much as heard of the thyroid gland. But it may well be that the same is not true of the organs of generation. They are capable of control and of abuse. As to these, knowledge of their construction, their functions and possible methods of their control may be not only legitimate but most expedient, and more particularly in the case of the woman. Those who think that it is legitimate and expedient are certainly entitled to hold that opinion and to do their best to impart the knowledge and assist the man or woman to make use of it. The whole question is as to the manner in which the communication of the knowledge and the suggested application of the knowledge is made. Is it so made as to deprave and corrupt those whose minds are open to immoral influences ? If it is not, then, however plain the language may be, it is not obscene. My Lords, it is for the jury and the jury alone to answer these questions. I am not going to express, it is not my function to express, any opinion as to how they ought to be answered in this case. I am going only to look and see whether there was evidence upon which the jury could answer as they did. Was there evidence upon which twelve jurors could reasonably find that the comment in the libel was not fair, that the imputation of victimization and of obscenity was not justified ?

I put in the forefront something from the evidence of three of the defendant's witnesses. The first is this : Professor Anne Louise McIlroy, a principal witness for the defendant, said this in cross-examination with reference to the plaintiff's publications.

" *Q.* Do you think that this is a genuine desire to help in this problem or not ?—*A.* I think it is a misguided desire, but

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I have no doubt it is a desire which I am perfectly sure is perfectly genuine.

"*Q.* It is a genuine desire to help ?—*A.* Yes, but a misguided one."

And again upon a question as to marital intercourse when the woman's health is being impaired by excessive child bearing. "*Q.* Do not you think that is a question which is at least as important to the welfare of human people in this country as the medical side of it ?—*A.* I think so. *Q.* Do you yourself think that this lady is genuinely trying to deal with that other side of it ?—*A.* Yes. *Q.* Do you yourself think that she has done anything which is wicked in what she has done ?—*A.* I think she is misguided." The second is this: The defendant, Dr. Sutherland, at p. 282, answers thus: "*Q.* Do you think this book is a piece of thoughtful writing—Married Love ? —*A.* Would you tell me what you mean by thoughtful ? I am going to say straight away I believe the book was written with the very best intention in the world. I am quite sure of that." The third is this: Dr. Mary Scharlieb, p. 305, had no doubt that the plaintiff was sincere. She considered that the plaintiff's work was an honest attempt but a very mistaken work, and (p. 307) she quite recognized the plaintiff's sincerity and goodness of intention. After these answers it seems to me impossible to dispute that the jury could properly find that the imputation in the libel of victimization of poor and helpless persons and of criminal action was not justified.

I turn to the evidence of the plaintiff's witnesses. She called several medical witnesses of eminence in their profession. Sir James Barr approved the plaintiff's clinic and thought it was doing an enormous amount of good. He thought the method adopted at the plaintiff's clinic was a perfectly simple method and perfectly harmless. Sir William Arbuthnot Lane said that Dr. Stopes' work came to him as a matter of intense interest. "I felt we had come across a real philanthropist at last and an intelligent one, I may say." He thought (p. 169) that Married Love would do a girl who had reached active sexual life a great deal of good. Dr. Harold Chappell (p. 173) thought that "these are matters which we

are constantly discussing, and there is a very real need for them to be discussed quite frankly and openly." Sir William Maddock Bayliss (p. 189) saw nothing in the least objectionable in any of the plaintiff's books. He thought (p. 191) that the most important thing one could do is to bring up children with a clean knowledge of the whole of the sexual relations. Dr. J. L. Hawthorn (p. 198) approved the plaintiff's books and (p. 198) found nothing at all objectionable in any part of Married Love. The Rt. Hon. G. H. Roberts (p. 249) had always appreciated the fact that the subject was one that ought to be treated with tact and delicacy, and felt that Dr. Marie Stopes and those associated with her had done so. Dr. Norman Haire (a witness called by the defendants), referring (p. 312) to a letter which he had written to the plaintiff, said that he had "expressed admiration for the splendid work which she had done." He thought that the plaintiff's books (p. 315) were " serving a very useful purpose." He says this three times. He thinks (p. 316) that it is a very admirable thing that this knowledge should be made public ; that there are numbers of terrible tragedies through ignorance in this matter, and he thinks Dr. Stopes' books are excellent. But he disagrees very greatly with her book, the New Gospel to all Peoples. (This is a book called A Revelation of God uniting Physiology and the Religions of Man.) And he thinks (p. 315) that the plaintiff's books " give knowledge of sex to women who otherwise cannot get it." Dr. Agnes Forbes Shorter (again a witness called by the defendants) thinks (p. 322) that Married Love " is evidently written with a very high intention."

My Lords, the jury had before them all the evidence which I have quoted. They had the plaintiff's books before them. They were in a position to judge and it was for them to judge whether they were written too little from a medical and too much from a sexual or emotional standpoint. They had, of course, a great deal more evidence. I express no opinion at all of my own upon the question whether the comment was fair or not. That is not for me, it is for the jury and the jury alone. But I will say that in my judgment it is impossible

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to say that twelve reasonable jurors could not accept and if they thought fit act upon that evidence and find that the imputation conveyed by the language of the libel as to exposing to experiment the poor, who owing to their poverty, lack of learning, and helplessness were the natural victims of experiments and as to a monstrous campaign, amounting to a crime, more serious than that for which Charles Bradlaugh was condemned to jail was not justifiable. Imputations of victimization of the helpless poor and of criminality deserving of imprisonment are not matters to be lightly regarded. They may well cut deep, and the more so in the case of a lady who is giving her time and her money to afford as she thinks (and as her opponents admit bona fide thinks) assistance to her poorer sisters. In my opinion the majority of the Court of Appeal were right in upholding the verdict in the third answer, and giving judgment for the plaintiff in accordance with the finding of the jury upon the third question left to them.

This action I have no doubt was brought not so much to recover money as to re-establish a reputation damaged by libel. As a result of the judgment of this House the plaintiff will fail to recover the damages which the jury awarded. But it remains that a jury have found that the defendant's comment in the matter was not fair, and that their finding in that respect fails to find its proper conclusion in damages by reason only of the fact that your Lordships are of opinion that after their answer to the second question was given the third question was, for the reasons which your Lordships have assigned, not open to them.

I ought to add, that if I am wrong in the view which I have expressed as to the summing up, and if the finding to the third question is not to have effect, then the plaintiff is, I think, entitled to a new trial. For in such case there will have been by reason of misdirection no proper trial of the issue of fair comment. In this view of the case, I have to take it that the learned Lord Chief Justice did not properly direct the jury to discriminate between fact and opinion and to answer this question—namely, If you find that all those which you find

to be statements of fact are true, then do you find that those which you find to be statements of opinion are fair comment? The plaintiff is entitled to an answer to that question.

In my judgment this appeal should be dismissed and the order of the Court of Appeal upholding the verdict of the jury on fair comment should be upheld. And if a majority of this House is of a contrary opinion then in my judgment there should be a new trial.

But as upon both points the majority of your Lordships are of a different opinion this appeal must be allowed, and a new trial must be refused.

LORD CARSON. My Lords, the defendants in this action pleaded that the words complained of in the alleged libel in their natural meaning were true in substance and in fact, i.e., a plea of justification. I have never heard a doubt expressed until this action that such a plea, if proved, is not an answer to any action for defamation. The plea puts upon the defendant the onus of proving not only that the facts alleged to be defamatory are true, but also that any comments in so far as they contain statements or inferences of a defamatory character are also true.

This plea therefore, whether the alleged libel consists of facts only or of comments as well as facts, is a complete answer to any action for defamation. "It is sufficient, however, if the charge on the plaintiff's conduct in the libel is substantially met and answered in the justification. It is unnecessary to repeat any word which might have been the subject of the original comment. So much must be justified as meets the sting of the charge; but if anything be contained in a charge which does not add to the sting of it, that need not be justified": Selwyn's Nisi Prius, vol. ii., 1060, 12th ed. The authorities referred to fully bear out the statement of the law as contained in this passage.

My Lords, I have said so much because I cannot agree with the view expressed by Bankes L.J. in the Court of Appeal in this case, when he says: "Under ordinary circumstances,

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when justification and fair comment are pleaded, and when it is in issue whether the words complained of are defamatory, the questions for the jury are : (1.) Are the words defamatory ? If yea, then (2.) are they statements of fact or expressions of opinion or partly one or partly the other ? (3.) In so far as you find that they are statements of fact, are they true ? (4.) In so far as they are expressions of opinion do they exceed the limits of fair criticism upon the matters of public interest ? " Such questions appear to me to overlook the real nature of a plea of justification which must stand or fall if so pleaded as a complete answer to the whole of the libel complained of, and cannot be aided by a plea of fair comment, which is no longer relevant if once the plea of justification is found in favour of the defendant.

There is a further paragraph in the judgment of the learned Lord Justice which, in my opinion, is open to the same criticism. He says : " I am not able to agree with the view taken by the Lord Chief Justice that this is a case in which the rule applies that a plea of fair comment does not arise if the plea of justification is made good. The rule applies and applies only, in my opinion, when the justification affords a complete answer. There may be many cases of which the present is, in my opinion, an example, when a jury may consider that the facts are quite truly stated and yet that what they regard as expressions of opinion upon those facts are not fair." My Lords, if upon a plea of justification the jury do not find that the comments or expressions of opinion so far as they contain defamatory matter and are substantial and material parts of the libel complained of are true, their duty would be to find against the defendant on the plea of justification, which cannot be aided or supported by a finding on a plea of fair comment. In the course of the argument I asked Sir Hugh Fraser, the very experienced and able counsel for the respondent, if there was or could be a case in which a plea of justification if proved and accepted by the jury would not be a complete answer, and he very candidly replied in the negative. My Lords, an examination of the proceedings in the present case can, I think, lead to no other conclusion

than that it was fought throughout on the plea of justification. I agree with Bankes L.J. when he says : " In his final speech to the jury Mr. Hastings clearly invited the jury to treat the libel as consisting entirely of statements of fact and to concentrate their attention on the two main charges, namely, that the plaintiff was, in the language of the innuendo, taking advantage of the ignorance of the poor to subject them to experiments of a most harmful and dangerous nature and that she was guilty of a serious crime for which she should be imprisoned. If any possible doubt existed as to Mr. Hastings's attitude it is set at rest by the note of the Lord Chief Justice in which he summarises Mr. Hastings' contention as to which of the statements in the libel are statements of fact." I may add also that the suggestion of a specific question to the jury as to whether the words complained of were true was suggested by Mr. Hastings and was agreed to by counsel on behalf of the defendants, Serjeant Sullivan observing : " The other, my Lord, would be a plea of whether the libel, that is to say fact plus deduction, was true in substance and in fact."

Bankes L.J. also quotes a passage from the closing address of Serjeant Sullivan for the defendants, in which, amongst other matters, he states that " a plea of justification is a plea of justification not only of the words themselves simpliciter, but a plea of justification goes to the induction or meaning that is put upon the whole paragraph. You plead justification not only in respect of your plain statement of fact but also in respect of your inferences both of fact and opinion." As Bankes L.J. observes, " The learned counsel is here accepting, as it seems to me, Mr. Hastings' challenge to deal with the case as though the only issue was, Are the charges made by the defendants against the plaintiff true or are they not ? " and he refers to the learned counsel's summing up in this plea of justification. " I most respectfully invite you to find that that statement in its broadest meaning, the whole of that paragraph, whatever meaning you may ascribe to it, does not go one inch beyond the truth in substance and in fact." When one turns to the summing up of the Lord Chief Justice

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it is quite evident that he specifically dealt with and explained to the jury the "facts" as put forward in Mr. Hastings' requisition as already referred to and fully explained them and the evidence relating to them to the jury. Furthermore, after the verdict had been given and after argument upon the findings of the jury, the Lord Chief Justice stated in entering judgment for the defendants: "In this case the jury, after a protracted deliberation extending to something like four hours, have found by their verdict that the words complained of in this action, while they were defamatory of the plaintiff, were true in substance and in fact. In the course which the case took that really became the main issue. . . . . I have always understood that in the words which have been quoted it is a good defence to an action for libel that the words complained of were true in substance and in fact."

My Lords, I do not think that this House or any appellate tribunal can be too careful in ascertaining by an examination of the proceedings what was the course of the trial, what was the real issue fought out by the assent of the parties on both sides? More especially is that necessary in a case where a defendant has frankly and fully taken upon himself the onus of all that is involved in such a plea as that of justification in a libel action, and any appellate tribunal ought to be slow in ordering a new trial under such circumstances unless there has been some substantial misdirection or other flaw in the conduct of the trial which you can at least say may reasonably have caused a miscarriage of justice.

My Lords, in the present case it is said that by reason of the finding of the jury in the plea of fair comment, the jury indicate that they did not understand the position, and that this difficulty was brought about by some misdirection on the part of the Lord Chief Justice. In my opinion, the jury ought not to have been allowed to consider the plea of fair comment at all when once they had found the justification proved, and I think it would have been better if the Lord Chief Justice had so instructed them. I also agree that passages can be selected in the summing up which seem to show some

confusion between facts and opinions in relation to a plea of justification. But, my Lords, as the Chief Justice has pointed out and as I think a careful examination of the whole proceeding shows in the course which the case took, the main issue was were the words complained of true in substance and in fact? On that plea the charge in the libel has been "substantially met," and so much has been justified "as meets the sting of the charge," and on that ground alone I would be prepared to set aside the order of the Court of Appeal and restore the judgment of the Lord Chief Justice. But, my Lords, I should also like to add that if the answer to the plea of fair comment means that notwithstanding the finding on the plea of justification, there were comments that were unfair, I agree with Younger L.J. that there was no evidence "on which a rational verdict could be found to the effect that these remaining comments of the defendants were either unfair or dishonest."

My Lords, I cannot help thinking that some of the confusion and difficulty which has arisen in this case has been caused by reason of the form of plea which has been described before us as the rolled up plea, and the cases cited before us show that not for the first time this form of plea has given rise to doubts and difficulties. That plea No. 7 in the first defendant's statement of defence has nothing whatever to do with a plea of justification. It is not partly justification and partly fair comment, but fair comment pure and simple, no doubt in an altered form from the old one, but nevertheless fair comment only. And I desire to express my entire concurrence with the statement of the late Lord Collins when he was Master of the Rolls in the case of *Digby* v. *Financial News, Ld.* (1), which is as follows: "When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel. This plea does not purport to be a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort, but is a plea intended to raise a totally different defence, that of fair comment. Comment, in order to be fair,

(1) [1907] 1 K. B. 502, 507.

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must be based upon facts, and if a defendant cannot shew that his comments contain no misstatements of fact, he cannot prove a defence of fair comment."

For the reasons I have given, I agree with the motion proposed by the Lord Chancellor.

My Lords, but for the statements made by my noble and learned friend who has just addressed the House, I should not have thought it necessary or opportune, in considering the legal problems which arise for decision in this case, to have said anything whatever on the subject of the policy of birth control, or the merits or demerits of the plaintiff in the part she plays in furtherance of that object.

I feel bound, however, after listening to the speech of my noble friend, to say that the recital of alleged facts and views he has expressed, which seem to me and will be read by others as being in sympathy with the actions of the plaintiff or her writings or of certain evidence produced on her behalf, must not be taken as in any way representing my own views if I had thought it necessary or relevant to discuss them. I speak of course only for myself, and I notice that the Lord Chancellor and the two noble Lords who followed him have not referred to these matters, a course which I had intended to adopt but for the statements of my noble and learned friend.

Order of the Court of Appeal complained of in the original and cross appeals reversed, and judgment of the Lord Chief Justice of England restored. Cross-appeal dismissed. Marie C. C. Stopes to pay to H. G. Sutherland and Harding and More, Ld., the costs in the Court of Appeal, and also the costs of the original and cross appeals to this House; and to repay to the said H. G. Sutherland and Harding and More, Ld., the sums of one hundred pounds and one thousand three hundred and twenty-five pounds five shillings and sevenpence, being respectively the damages and costs paid to the said Marie C. C. Stopes

by the said H. G. Sutherland and Harding and More, Ld., under the order of the Court of Appeal. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

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Lords' Journals, Nov. 21, 1924.

Solicitors for the appellants: *Charles Russell & Co.*
Solicitors for the respondent: *Braby & Waller.*

[HOUSE OF LORDS.]

Applied. McKEE v. McKEE [1951] A. C. 352

WARD . . . . . APPELLANT;

AND

LAVERTY AND ANOTHER . . . . . RESPONDENTS.

H. L. (IR.)* 1924 *May* 6.

Infants — Custody — Religious Education — Direction of deceased Father — Welfare of Children—Change of religious Education—Separation of Family.

A paternal great-aunt of three orphan children applied for a writ of habeas corpus with a view to the children being placed in the custody of their paternal relatives and being brought up in the Roman Catholic faith. The parents were married in 1911 according to the rites of the Roman Catholic Church. The mother, who had been a Presbyterian, became a Roman Catholic shortly before her marriage. The three children of the marriage, daughters, were baptized according to the rites of the Roman Catholic Church, and brought up in that faith. The father fell into habits of intemperance, and ceased to provide a home for his wife and children. In June, 1920, the mother left her husband and took the children with her to live at her parents' house. At the same time the eldest girl was removed from a Roman Catholic School to a Protestant School, which she had since attended. In July, 1920, the father made his will, whereby he directed that his children should be brought up in the Roman Catholic faith, and he died in October, 1920. Thereafter the mother again became a Presbyterian, and died in 1923 a member of that Church. The children continued to live with their maternal grandparents, who brought them up as Presbyterians. At the time of the present application the children were aged respectively eleven, six, and four years. The judges of the

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* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, and LORD SUMNER.

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King's Bench Division, after interviewing the eldest girl, were satisfied that she had acquired strong Presbyterian convictions:—

Held, that it would not be for the benefit of the eldest child to remove her from a Protestant to a Roman Catholic household, and that it would not be for the benefit of the younger children to separate them from their elder sister, but that it was for the welfare of all the children that they should be brought up together in the custody of their maternal relatives.

Decision of the Court of Appeal in Northern Ireland [1924] 2 I. R. 19 affirmed.

APPEAL from an order of the Court of Appeal in Northern Ireland varying an order of the King's Bench Division in Northern Ireland. (1)

The question raised by the appeal was whether the custody of all or any of the three infant children of Matthew and Elizabeth Ward, both of whom were dead, should be entrusted to the appellant, Miss Brigid Ward, an aunt of the husband's, and brought up in the Roman Catholic religion, or to the respondents, Mr. and Mrs. Laverty, the parents of the wife, and brought up as Presbyterians.

The parents were married according to the rites of the Roman Catholic Church, but the mother had originally been a Presbyterian, and after the death of her husband reverted to that faith, and since her death the children had been maintained by the respondents and brought up as Presbyterians. The facts are fully stated in the judgment of Viscount Cave, and are summarized in the headnote.

Upon an application by the appellant for a writ of habeas corpus directed to the respondents to have the bodies of the three children before the Court, the Divisional Court (Sir Denis Henry C.J. and Brown J.), being satisfied, after interviewing the eldest child, that she had acquired fixed Presbyterian convictions, made no order as regards her, but ordered the writ to issue as regards the two younger children, as they were of opinion that in their case the wish of the father that the children should be brought up in the Roman Catholic faith ought to prevail.

The Court of Appeal (Moore and Andrews L.JJ.) were of

(1) [1924] 2 I. R. 19.

opinion that the children ought not to be separated, and that it was for their welfare that they should remain in the custody of their maternal grandparents. They therefore discharged the order of the King's Bench Division as regards the younger children.

1924. May 5. *McGonigal K.C.* and *T. J. Campbell K.C.* (with them *Patrick McCorry*) (all of the Irish Bar) for the appellant.

The wishes of the father with regard to the religious education of the children of the marriage should have effect given to them unless there is something exceptional affecting the welfare of the children or unless he has by his conduct forfeited or abandoned his right to direct the religious education of the children: *Hawksworth* v. *Hawksworth* (1); *Andrews* v. *Salt* (2); *Davis* v. *Davis* (3); *Hill* v. *Hill* (4); *In re Agar-Ellis* (5); *In re Newton* (6); *In re Goldsworthy.* (7) There is in this case nothing affecting the welfare of the children which will induce the Court to override the wishes of the father, nor can the father by his conduct be held to have forfeited or abandoned his right to educate the children in his own religion. The Guardianship of Infants Act, 1886, s. 5, and the Custody of Children Act, 1891, s. 4, while they give wider rights to the mother as to the custody of the children, do not interfere with the right of the father to direct the religious education of the children unless he has forfeited his right. *Stourton* v. *Stourton* (8) has no analogy to the present case. As to the separation of the children: see *In re Clarke* (9); *In re McGrath* (10); *In re Grey* (11); *In re O'Hara* (12); *In re W.* (13); *In re Story* (14); *Warde* v. *Warde.* (15) Not one of those cases supports the proposition

(1) (1871) L. R. 6 Ch. 539, 542.
(2) (1873) L. R. 8 Ch. 622.
(3) (1862) 10 W. R. 245.
(4) (1862) 10 W. R. 400.
(5) (1878) 10 Ch. D. 49.
(6) [1896] 1 Ch. 740.
(7) (1876) 2 Q. B. D. 75, 82–3.
(8) (1857) 8 D. M. & G. 760, 771.
(9) (1882) 21 Ch. D. 817.
(10) [1893] 1 Ch. 143.
(11) [1902] 2 I. R. 684, 690.
(12) [1900] 2 I. R. 232.
(13) [1907] 2 Ch. 557.
(14) [1916] 2 I. R. 328, 347.
(15) (1849) 2 Ph. 786, 791.

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that a separation of the family justifies the Court in disregarding the wishes of the father as to the children's religious education.

Babington K.C., *E. S. Murphy K.C.* and *William Lowry* (all of the Irish Bar) for the respondents were not called upon.

1924. May 6. VISCOUNT CAVE. My Lords, this is an appeal from an order of the Court of Appeal in Northern Ireland partly affirming and partly reversing an order made by a Divisional Court of the King's Bench Division.

The order under appeal relates to the three orphan daughters of the late Matthew Joseph Ward and Elizabeth his wife, the daughters being Mary, who is now aged twelve and a quarter, Lila, who is now aged seven, and Peggy, who will be five at the end of this month. These children are now and have for some time been in the care of their maternal grandparents, Mr. and Mrs. Laverty, the respondents to this appeal. The grandparents are Presbyterians, and the children are being or will be brought up as Presbyterians. The order under appeal was made upon an application of Miss Brigid Ward, an aunt of the children's father, and therefore a great-aunt of the children, for the issue of a writ of habeas corpus with a view to the children being placed in the custody of their paternal relatives, who are Roman Catholics, and being brought up in the Roman Catholic faith. The Divisional Court refused a rule as regards the eldest child, Mary, but granted it as regards the two younger children; and, cross-appeals having been lodged, the Court of Appeal affirmed the decision as regards Mary, but as regards the younger children reversed the decision of the Divisional Court and refused a rule. Hence the present appeal.

My Lords, the facts, when the affidavits are carefully looked into, are not seriously in dispute. Matthew Joseph Ward, who was a Roman Catholic, was married on February 22, 1911, to Elizabeth Laverty, a daughter of the respondents, who, as I have said, are Presbyterians. Elizabeth Laverty, the wife, had until that time been a Protestant, but just

before, and probably with a view to the marriage, she was received into the Roman Catholic Church. The couple lived in Belfast, and these three children were born to them, one in January, 1912, one in April, 1917, and the third in May, 1919. The daughter Mary, when she was old enough, attended a Roman Catholic school in Belfast, and at the age of seven years or thereabouts made her first Communion in accordance with the practice of the Roman Catholic Church. The other two children were quite young until the date when their father died, one being then only three years old and the other one year old; and, of course, no question of religion had arisen as to those two young children.

The marriage was not a happy one, and certainly it was not a fortunate one for the wife. The husband constantly drank to excess, and, in April, 1912, three months after the birth of the first child, was discharged for intemperance from his employment. After that time the habit of intemperance continued, and he was constantly drunk; he was also cruel and violent to his wife, and on one occasion (in the year 1915) he was convicted of an assault upon his wife and of habitual drunkenness. He failed to support his wife and children properly, so that the wife had to keep herself and her children, and at times (as I gather from the affidavits) her husband also, by what she could earn at dressmaking. On several occasions she was forced to leave her husband, and with her children to take refuge with her parents, the respondents, who, apparently, were always ready to receive and to succour her. In the month of June, 1920, the final rupture occurred. At that date the wife left her husband, with the children, and went to live with her parents. The husband went to live with his brother at a place called Gargory, about thirty miles from Belfast; and from that time until his death he neither supported his family nor, so far as the evidence shows, took any interest in them at all. The husband, the father of the children, died somewhat suddenly on October 27, 1920. He left a will, which has been proved, by which he gave his freehold property to be sold and the proceeds to be distributed among the children equally, and he desired his wife to be

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trustee of the proceeds; and he added: "I also wish and desire that those three children be brought up in the Roman Catholic faith, in which they were baptized, and of which they are at present members." It is said that the value of the property is about 2000*l*.

My Lords, I now turn to the history of these children since the separation of their parents in June, 1920. It would appear that at, or soon after, that time the mother of the children ceased to conform to the Roman Catholic faith; for it is proved that, immediately after leaving her husband, she took the child Mary away from the Roman Catholic school, which she had attended, and caused her to attend a National School connected with the Baptist denomination. Mary would then be about eight and a half years old, and she continued to attend that school until the commencement of these proceedings. It is suggested in one affidavit that the father approved of her being sent to that school. I doubt whether that is established, and I think the more probable view of the evidence is that he neither inquired nor cared how or where the child was receiving her education. At about the same time, or soon afterwards, Mary began to attend the Presbyterian Church, St. Enoch's Church, with her grandparents and their family, for in addition to the grandparents there were two unmarried daughters living with them; and I have no doubt, on a fair reading of the evidence, that the wife, Mrs. Ward, also attended that church. At all events, it is proved that before her death she reverted to her former faith, became again a Presbyterian, and died in that Communion. The Reverend John Pollock, who is the minister of St. Enoch's Church, said in evidence that the little girl, Mary, came regularly to the church with her grandfather, that he conversed with her on religious matters once or twice, and that his opinion was that she had decided convictions in favour of the church she was then attending. He based that opinion on what he knew of her mind in the matter.

During this period—that is to say, from June, 1920, to the date of the mother's death in March, 1923—it is not proved that any member of the father's family took sufficient interest

in the children to find out in what religion they were being brought up, or where the eldest girl went to school. There is some vague evidence that they endeavoured to see the children and that from time to time the mother of the children visited the great-aunts, but there is nothing to show that the great-aunt who applies, Brigid Ward, or her sister, Mrs. Jordan, who makes an affidavit, made any real attempt to find out how the children were being brought up.

My Lords, the mother of the children, Mrs. Ward, died on March 23, 1923, and thereupon their paternal relatives began to make some inquiries, and in April, 1923, they took these proceedings, with the result which I have stated. To make the story complete I should add that it is not disputed that the children are happy in their present home, and that the grandparents are fond of them—their conduct during the last twelve years is sufficient evidence of that—and the grandparents say that they are ready and willing to care for the welfare and happiness of the children if they are left with them. On the other hand, the paternal relatives, who have shown little interest in the children in the past, do not now in their evidence profess any affection for them—probably they are little known to the children—and the only reason for the application given in the affidavit of the appellant is that the paternal relatives desire that they should be brought up in the religion of their father. For that reason, they say, they are willing to take the custody of the children and to keep them at their place, which is an upper floor above some licensed premises, where the two great-aunts, Mrs. Jordan and Miss Ward, reside ; and there is some suggestion that the children may be sent to a school or institution connected with the Roman Catholic religion. There is further the important fact that the learned judges of the King's Bench Division saw the eldest child, Mary, as they were, of course, quite entitled to do ; and the Lord Chief Justice gives his account of the interview. He says (on p. 32 of the Appendix) : " We saw the child ourselves. She is a bright intelligent child, between eleven and twelve, and the opinion we have formed of her coincides with that of the reverend gentleman "—that

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is to say, the Reverend Mr. Pollock, who had stated that she had decided convictions in favour of the Presbyterian Church. That statement about her convictions is confirmed by the evidence of the grandparents.

Now, my Lords, upon those facts the question is what ought to be done as regards these children? The law in these cases is well settled, and, indeed, is not contested by the learned counsel who argued the case before this House. On the question of the religion in which a young child is to be brought up, the wishes of the father of the child are to be considered; and, if there is no other matter to be taken into account, then, according to the practice of our Courts, the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount considerations in these cases. Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now; but in the more recent decisions, and especially since the passing of the Guardianship of Infants Act, 1886, s. 5 of which Act shows the modern feeling in these matters, the greater stress is laid upon the welfare and happiness of the children. It is, of course, still true, as the learned counsel who argued the case quite properly said, that a sufficient case must be made for going contrary to the father's wishes; but, if such a case is made, then the Courts have no hesitation in deciding upon the whole facts of the case.

Now, my Lords, looking at the matter in that light, what is the true conclusion in this case? I take first the daughter Mary. She is a child of twelve, bright and intelligent; and the evidence, and the statement of the learned judges of the King's Bench Division, show that she is interested in religious matters, and has decided convictions in favour of the Presbyterian Church. For nearly four years she has attended a Protestant school, and for the greater part of that time she

has worshipped at a Protestant church. No doubt she is still young, but the growth in character and in conviction during the years from eight to twelve is infinitely swifter and of more importance than it would be in the tender years up to the age of eight; and, in view of what the learned judges have said, I think your Lordships will have no difficulty in accepting the view that this child has acquired settled or, at all events, strong convictions in favour of the Protestant faith and of the Presbyterian Church which she is attending.

Now, if that is so, to force a change of religion upon this young child now would be a serious matter. It might, as a distinguished judge said in the case of *Stourton* v. *Stourton* (1), which has been cited, have the result that, assuming tares to have been sown, the wheat would be pulled up with the tares; that is, it might wholly confuse her religious beliefs, and the ultimate effect might be that she would cease to have any religious convictions at all. There is a danger, as Lindley L.J. said in the case of *In re McGrath* (2), in allowing relatives on one side or the other to play "battledore and shuttlecock" with the religious training of a child of that age. Where a conviction in favour of a particular faith is found to exist, then I think any Court would hesitate long before permitting it to be subjected to that risk.

My Lords, there is also the question of the welfare and the future happiness of the child in other respects. As to the question of means, there is, as the learned judges have said, not much to choose between the relatives on the one side or the other. But there is this fact, that the child knows and is fond of her grandparents, with whom she has lived now for some years; that she relies, and is justified in relying, upon their tried affection; and that if she were now moved to a new home, where she would be among strangers, she might become unhappy, and she would not be in a position, as she is now, to take her troubles to those whom she knows and for whom she has conceived affection.

Against these considerations, my Lords, there are to be set the wishes of the child's father. I do not think the evidence

(1) 8 D. M. & G. 773. (2) [1893] 1 Ch. 151.

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is sufficient to show, in the words of some of the cases, that he abandoned his right to be heard upon the matter. I think that his wishes must still be considered, and that he has expressed them, not only in his will, but in the fact that throughout his life these children were brought up as Roman Catholics. At the same time, I do not think it is right to put entirely out of account the character of the father, the way in which he himself behaved, and especially the way in which he treated his wife, and the fact that he failed to support both his wife and his children. The wishes of such a father are not entitled to the same weight as those of one who has been called in the cases "a good and honest father." There is also the fact that some months before his death he permitted the home to be broken up and the children to be taken to a Protestant home, and, at all events, made no attempt to inquire in what faith the children were, from that time, being brought up. It is also to be remembered that for nearly three years after his death—namely, from October, 1920, to March, 1923—his relatives appear to have taken no steps either to find out in what religion the children were being brought up, or to ensure that they should be brought up in the faith of their father. If the considerations on both sides are weighed, I think there can be no doubt that it will be for the welfare of the daughter Mary that, so far as she is concerned, things should be left as they are, and that it would be most injurious to her welfare to take her away now from the custody of her grandparents, or to remove her from a Protestant to a Roman Catholic household. With regard to Mary, therefore, I entertain no doubt at all that the decision of the Court of Appeal was right, and should be affirmed.

As regards the two younger children, Lila and Peggy, the case of course is different. As to these children, no question of religious convictions arises; they are far too young to have formed any such convictions. But the decision of the Court of Appeal proceeds upon this, that it would be wrong to separate them from their elder sister and to deprive them, not only of the care of their grandparents, but of the

care which an elder sister, even of the age of twelve, can give to her little sisters, and also that, from a spiritual point of view, it would be wrong in this case to create a division in religion between these members of one family, to have the eldest child brought up as a Protestant and the two younger ones brought up as Roman Catholics. My Lords, that point was mentioned, but, so far as the judgment shows, was not very much considered, by the learned judges of the King's Bench Division. It was fully considered by the Court of Appeal, and they came to the conclusion that, for the reasons which I have stated briefly, but which are stated at much greater length in their judgment, it would not be for the welfare of the younger children to remove them from the care of their grandparents and to commit them to the care of their paternal great-aunts. I have again carefully considered the matter, and I find myself, on this point also, in agreement with the Court of Appeal. It is admitted quite frankly that, if the children remain where they are, they will be brought up as Protestants; but the applicants have disclaimed any desire to have directions given as to the religion in which the children shall be brought up apart from the question of custody. They ask for custody, and not for any special order as to religious faith. That being so, one must consider the question as a whole. I do not think it would be for the good of these little girls that they should be separated in residence from their elder sister, that they should lose her companionship and care, or that in their future life they should be divided from her by what has been referred to as "the chasm of different religious opinions"; nor do I think that it would be for their benefit now to deprive them of the affectionate care of their grandparents and the other members of the household in which they are now living.

These considerations, which relate to the welfare of the younger children, appear to me to prevail over the wishes of the father, especially such a father as this; and accordingly I have come to the conclusion that, in this case also, the decision of the Court of Appeal is the right one. I move that this appeal be dismissed with costs.

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VISCOUNT FINLAY. My Lords, I have arrived at the same conclusion, and for precisely the same reasons as those which have been just stated from the Woolsack.

LORD ATKINSON. My Lords, I concur for the same reasons.

LORD SUMNER. My Lords, I agree.

Order of the Court of Appeal in Northern Ireland affirmed and appeal dismissed with costs.

Lords' Journals, May 6, 1924.

Solicitors for the appellant: *John B. & F. Purchase & Clark, for Daniel O'Rorke & Son, Belfast.*

Solicitors for the respondents: *Barlow, Lyde & Yates, for C. & H. Jefferson, Belfast.*

[HOUSE OF LORDS.]

H. L. (E.)* 1924 *July* 22.

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK . . . . . } APPELLANTS;

AND

COMPTOIR D'ESCOMPTE DE MULHOUSE AND OTHERS . . . . . } RESPONDENTS.

Banker—Foreign Corporation—Russian Bank—London Branch—Authority to Branch Manager to sue in Name of Bank—Deposit of Bonds to secure Loan—Action in Name of Bank to recover Bonds—Nationalization of Banking by Decree of Soviet Government—Effect of Decree on Branch Manager's Authority—Estoppel.

In 1914 a Russian Bank had its head office in Petrograd and a branch office in London, the manager of which was authorized by a power of attorney to transact business for and bring actions in the name of the Bank. By the direction of the Petrograd office the London branch deposited with a London bank certain Brazilian and Chinese Government bonds to be held to the order and on account of a French Bank as security

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* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

for a banker's credit opened by the French Bank for the benefit of the Russian Bank.

In and after 1918 the Soviet Government of Russia by various decrees and orders nationalized banking in Russia by taking over the assets, share capital and management of all private banks and vesting them in a State Bank, then in a People's Bank, and ultimately in a Government Department. Subsequently the manager of the London branch agreed with the French Bank to pay off the amount due to the latter on the banker's credit in return for the bonds. The amount was paid, but the French Bank refused to release the bonds.

In an action brought in the name of the Russian Bank by the manager of the London branch against the French Bank and the London Bank for the return of the bonds, the defendants by their defence alleged that the plaintiff Bank had ceased to exist, and disputed the authority of the London branch manager to bring the action.

Held, first, upon the construction of the decrees of the Soviet Government, that the defendants had not proved that the plaintiff Bank was dissolved or that the property in the bonds was no longer in the Bank.

Secondly, that it was not open to the defendants to raise by way of defence to the action the objection that the London branch manager had no authority to bring the action in the name of the plaintiff Bank, but that they ought to have moved to strike out the name of the Bank as plaintiff.

Richmond v. *Branson & Son* [1914] 1 Ch. 968 approved.

Daimler Co. v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307 distinguished.

Thirdly, that the defendants were estopped by their conduct from disputing the authority of the London branch manager.

Roe v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347, and *Rogers, Sons & Co.* v. *Lambert & Co.* [1891] 1 Q. B. 318 applied.

Decision of the Court of Appeal [1923] 2 K. B. 630 reversed.

APPEAL from an order of the Court of Appeal (1) affirming by a majority (Bankes and Scrutton L.JJ.; Atkin L.J. dissenting) a judgment of Sankey J.

The facts, which are summarized in the headnote, are stated in the report of the case before the Court of Appeal, and the several decrees and pronouncements of the Soviet Government in Russia are fully set out in a note appended to that report. The opinion of Viscount Cave also contains a detailed statement of the facts.

1924. May 13, 15, 16, 19, 20. *Sir Patrick Hastings A.-G.* (with him *Schiller K.C.* and *Micklethwait*) for the appellants. The respondents have failed to establish either that the

(1) [1923] 2 K. B. 630.

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appellant Bank has ceased to exist as a legal entity or that the authority of Mr. Jones, the manager of the London branch of the Bank, to carry on the branch business in London and to institute proceedings in the appellants' name is determined. The true inference from the facts is that the authorities in control of the appellant Bank recognized Mr. Jones's authority to carry on the branch business under his power of attorney and impliedly authorized him to do so. Assuming that the effect of the decrees of the Soviet Government was to destroy the entity of the appellant Bank in Russia those decrees have no extra-territorial operation, and, consequently, do not affect the assets and liabilities of the London branch of the Bank in this country: *Lecouturier* v. *Rey* (1); *Macleod* v. *Attorney-General for New South Wales* (2); *Wolff* v. *Oxholm.* (3) As to the relation between a branch and the head office of a bank, see Hart on Banking, 3rd ed., pp. 92, 93; *Woodland* v. *Fear.* (4) The respondents, having agreed with the London branch manager to hand over the bonds against payment and having thereby induced him as such manager to obtain the marks and make the payment to them under such agreement, are estopped from denying his authority to receive the bonds. In the absence of any claim to the bonds by the authorities in Russia the respondents cannot set up the jus tertii as a defence to the action: *Rogers, Sons & Co.* v. *Lambert & Co.* (5) Alternatively the respondents cannot approbate and reprobate in the same transaction: *Roe* v. *Mutual Credit Fund.* (6) The alleged want of authority to sue was not a matter of defence but should have been raised on a summons to set aside the proceedings: *Richmond* v. *Branson & Son.* (7) The decision of this House in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (8) is distinguishable, because there the plaintiff company was incapable of giving any retainer at all. The English Courts have authority to

(1) [1910] A. C. 262, 265.
(2) [1891] A. C. 455, 458.
(3) (1817) 6 M. & S. 92, 99, 105.
(4) (1857) 26 L. J. (Q. B.) 202, 204; 7 E. & B. 519, 521.
(5) [1891] 1 Q. B. 318, 323, 325.
(6) 19 Q. B. D. 347, 350.
(7) [1914] 1 Ch. 968, 974.
(8) [1916] 2 A. C. 307, 337.

wind up a foreign company which has an office and assets in this country: *In re Commercial Bank of India* (1); *In re Matheson Brothers* (2); *In re Commercial Bank of South Australia* (3); Buckley on Companies, 10th ed., p. 554; and, having regard to the language of s. 268, sub-s. 1 (iii.), of the Companies (Consolidation) Act, 1908, which provides for the winding up of a company after dissolution when there can be no members, it cannot be necessary that there should be more than seven members in existence at the date of the winding up: see per Swinfen Eady J. in *In re New York and Continental Line* (4), commenting upon *In re Bowling and Welby's Contract.* (5) This company has been properly wound up and the provisional liquidator, as the representative of the foreign company in this country, has the right to collect its assets and protect its creditors, and for that purpose to adopt the acts of the servants of the foreign company acting properly in the course of their business.

R. A. Wright K.C. and *O'Hagan* for the respondents. The appellant Bank has been abolished by the decrees of the Soviet Government. It is agreed that this was the intention of the Government, and the suggestion that this intention has failed is not borne out by the facts. This appeal is concerned with a Russian corporation recognized as such by other countries by the comity of nations, and if that corporation has been abolished by Russian law that abolition must be recognized here. The Soviet Government has declared the shares in this company cancelled, and the right to a share in this foreign company depends upon Russian law, which is now the law of the Soviet, that Government having been recognized in this country. It follows that upon the cancellation of the shares the members cease to be members. But a corporation cannot exist without corporators; consequently the abolition of the shareholders involves the abolition of the company. And if the Bank is abolished the branch goes with it; it has no separate entity of its own. The only

(1) (1868) L. R. 6 Eq. 517.
(2) (1884) 27 Ch. D. 225.
(3) (1886) 33 Ch. D. 174.
(4) (1909) 54 Sol. J. 117.
(5) [1895] 1 Ch. 663.

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plaintiff on the record being the Russian Bank, if that corporation is dissolved it cannot bring an action. There is therefore no plaintiff here at all. There being no Bank in existence, if anybody can sue it must be the Russian Government: Dicey's Conflict of Laws, 3rd ed., p. 511, rr. 139, 140; Foote's Private International Law, 4th ed., pp. 125, 126; Westlake's Private International Law, 6th ed., p. 373, § 306; Grant on Corporations, p. 50; *Bateman* v. *Service* (1); *Colonial Bank* v. *Cady and Williams* (2); *Continental Tyre and Rubber Co.* v. *Daimler Co.* (3); *Luther* v. *Sagor & Co.* (4) No doubt banking business was carried on after the Soviet decrees, but the person carrying on the business had changed. Assuming that the Bank has not been absolutely abolished, the effect of the nationalization of the Russian banks by the Soviet Government is to change the character of the Bank, and the power of attorney has become invalid. That power was given by an organization which on any view is swept away, and the London manager was in no sense acting for the company in its new guise. Therefore this action was not authorized: *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (5) [They also referred to *In re Thomas* (6) and *In re Clark.* (7)] As to the winding up: if Jones's authority has ceased is the liquidator in any better position?

[On the suggestion of Viscount Cave the argument on this point was postponed.]

As to estoppel: the doctrine of estoppel postulates a representation of an existing fact made to a person who relied upon it and whose position was thereby affected: *George Whitechurch, Ld.* v. *Cavanagh* (8); *Jorden* v. *Money.* (9) But here the real representation was made by Mr. Jones that he had authority to give a receipt. This

(1) (1881) 6 App. Cas. 386, 389.
(2) (1890) 15 App. Cas. 267.
(3) [1915] 1 K. B. 893, 915; [1916] 2 A. C. 307, 336–7.
(4) [1921] 3 K. B. 532.
(5) [1902] 1 K. B. 342, 347.
(6) (1884) 14 Q. B. D. 379.
(7) [1904] 1 Ch. 294.
(8) [1902] A. C. 117, 145.
(9) (1854) 5 H. L. C. 185.

consideration applies equally to the question of approbating and reprobating.

Sir Patrick Hastings A.-G. replied.

The House took time for consideration.

1924. July 22. VISCOUNT CAVE. My Lords, the facts leading up to this appeal may be shortly stated. The appellant, the Russian Commercial and Industrial Bank, was incorporated under Russian law in the year 1889, its capital being divided into shares. Its head office was in St. Petersburg, and it had branches in London, Paris and elsewhere. The manager of the London branch was Mr. Victor Jones, who held a power of attorney giving him wide powers. In January, 1914, the appellants through their head office obtained from the respondents Le Comptoir d'Escompte de Mulhouse (whom I will call "the Mulhouse Bank") an acceptance credit of 800,000 marks; and on the instructions of the head office the London branch deposited with the respondents the London County Westminster and Parrs Bank, Ld. (whom I will call "the Westminster Bank"), as security for the advance 29,000*l.* Chinese 5 per cent. bonds and 29,000*l.* Brazilian 4 per cent. bonds. In January, 1919, the London branch was minded to pay off the advance, and after some correspondence the amount due for principal and interest was agreed at Marks 1,090,000, and the Mulhouse Bank agreed to accept payment of that sum from the London branch. On September 15, 1919, the Mulhouse Bank wrote to the Paris branch of the appellant Bank in the following terms:—

"In pursuance of our verbal discussion with Monsieur Maurice Montebrun, your Attorney, we request you to remit for our account to the B.N. de C., at Mayence, the amount of:

Mk. 1,090,000—One million and ninety thousand Marks, representing approximately the balance of your account per 22nd September.

"On the other hand, we are writing to-day to the London County Westminster and Parrs Bank to hold at the

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disposal on the 22nd September of your London Office :

£29,000—Chinese 5 per cent. Bonds Capital and
£29,000—Brazil 4 per cent. 1911 Bonds Coupons secured.

security which has been lodged in 1914 by your London Office for account of your Petrograd Office for the purpose of covering our advance of 800,000 Marks.

"We will despatch to you as soon as possible a rectified extract of account, and request you to settle the difference as soon as possible with the B.N. de C., at Mayence, under advice to us."

In reliance on the agreement which had been made and confirmed by the above letter the London branch paid to the credit of the Mulhouse Bank the sum of Marks 1,090,000, and claimed delivery of the bonds ; but the Mulhouse Bank, having received the agreed amount, made difficulties about giving up the bonds, and finally instructed the Westminster Bank not to part with them. Thereupon this action was brought by the appellants against the Mulhouse Bank and the Westminster Bank, claiming the bonds and the interest accrued thereon with damages for their detention. The two defendant Banks joined in resisting the plaintiffs' claim, and by their defence as amended raised in substance two pleas—namely, (1.) that by virtue of certain decrees of the Soviet Government of Russia the plaintiff corporation had been dissolved and its property transferred to the People's State Bank of Russia ; and (2.) that the real plaintiff in the action was not the plaintiff corporation but Mr. Jones, and that the effect of the decrees above mentioned and of the seizure of the appellants' property in Russia was to determine his authority either to receive the bonds or to bring the action. In addition to these pleas, the Court had to consider a contention raised on behalf of the plaintiffs that the defendants having received the Marks 1,090,000 under the agreement confirmed by the above letter were estopped from alleging the plaintiffs' want of authority as an excuse for their failure to carry out their part of the agreement. During the currency of the proceedings an order was made under

s. 268 of the Companies Act, 1908, for the winding up of the appellant company, and the effect of that order had to be considered.

The action was heard by Sankey J., who gave judgment for the defendants, mainly on the second of the above pleas; and on appeal his judgment was confirmed by a majority of the Court of Appeal (Bankes and Scrutton L.JJ.) mainly on the first of the above pleas, Atkin L.J. dissenting. Both the Courts held that the alleged estoppel had not been made out. Hence the present appeal.

My Lords, in the course of argument of this appeal a number of questions were raised, and I propose to deal with them in the following order:—

1. Have the defendants proved that the appellant company is dissolved and therefore incapable of maintaining this action?

2. Have they proved that the property in the bonds in dispute is no longer in the appellant company?

3. Have they proved that the authority of Mr. Jones was determined and accordingly that he had no authority either to receive the bonds or to bring this action?

4. Were the defendants prevented by their conduct from alleging want of authority?

1. Before considering the effect of the decrees it appears desirable to refer briefly to the nature of the Constitution which was set up in Russia after the revolution of October, 1917. It appears from the evidence given in this case that after that time the supreme authority in Republican Russia was vested in the All Russian Congress of Soviets, but that legislative authority was also vested in the Central Executive Committee of Soviets. There was also an executive body called the Council of People's Commissaries, which had wide powers of administration; but all its orders or important decisions were subject to the examination and ratification of the Central Executive Committee. The Government so established originally exercised its functions in the northern districts of Russia only, including Petrograd and Moscow; but its authority was gradually extended over other parts of

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old Russia including the Ukraine. The Soviet Government was recognized by the British Government as the de facto Government of Russia in or about May, 1921 ; and it is well known that at a later period, that is to say, in January, 1924, it was recognized as the de jure Government also.

The decrees upon which the respondents relied in their pleadings were three in number and were dated December 14, 1917, January 26, 1918, and April 12, 1918. A fourth decree dated January 19, 1920, was discovered and put in evidence at a later period. There are also certain resolutions and instructions of the Russian Government which have to be taken into account.

The decree of December 14, 1917, was made by the Central Executive Committee and was in the following terms :—

" DECREE ON THE NATIONALIZATION OF BANKING.

" In the interests of the proper organization of national economic life, of the resolute eradication of banking speculation, and of the complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the object of establishing a single People's Bank of the Russian Republic—a bank genuinely serving the interests of the people and the poorest classes—the Central Executive Committee hereby decrees :—

" 1. Banking is declared a State monopoly.

" 2. All existing joint stock banks and banking houses are amalgamated with the State Bank.

" 3. The assets and liabilities of the liquidated banks are taken over by the State Bank.

" 4. The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree.

" 5. The management of the business of joint stock Banks is temporarily placed in the charge of the Council of the State Bank.

" 6. The interests of small investors shall be fully safeguarded."

The decree of January 26, 1918, was made by the Council of People's Commissaries, and there is no evidence that it

was confirmed by the Central Executive Committee. It was as follows :—

"DECREE OF THE COUNCIL OF PEOPLE'S COMMISSARIES CONFISCATING SHARE CAPITAL OF THE FORMER JOINT STOCK BANKS.

"1. The share capital (stock, reserve and special) of former joint stock banks are transferred to the State Bank of the Russian Republic on the basis of complete confiscation.

"2. All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped.

"3. All bank shares must forthwith be surrendered by the present holders to the local branches of the State Bank.

"4. The holders of bank shares which they cannot produce must submit to the branches of the State Bank register records of the shares in their holding, indicating their exact whereabouts.

"5. The holders of bank shares who have failed to surrender them in accordance with para. 3, or to submit register records of their shares in accordance with para. 4, within a period of two weeks following the day of the publication of the present decree, are punished by confiscation of all their property.

"6. All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years.

Signed VL. ULIANOFF (Lenin),
Chairman of the Council of the People's Commissaries.
Signed VL. BONTCH-BRUIEVITCH,
Principal Secretary to the Council of People's Commissaries."

It appears that at or about the time when these decrees were passed the premises of the appellant Bank in Petrograd were seized by Red Guards, and a commissary appointed by the State Bank took possession of the books and securities of the appellant Bank. Shortly afterwards the name of the appellant Bank was removed, and a board was put up over the premises bearing the words "People's Bank No. 4."

On April 12, 1918, the Principal Commissariat of the

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People's Bank issued a notice stating that "The administration of the late private banks is abolished as from the 1st April 1918, and its functions are handed over to the People's Bank of the Russian Republic." This notice is referred to in the defence as a decree.

On July 10, 1918, the fifth All Russian Congress of Soviets adopted a new Constitution, which included the following paragraph :—

"There is confirmed the passing of all banks into the ownership of The Workmen-Peasants' State as one of the conditions of the emancipation of the labouring masses from beneath the yoke of capital."

On September 20, 1918, the Council of the People's Commissaries passed the following resolution :—

"Having considered the report of the People's Commissary of Finance as to the mode of further carrying into effect of the nationalization of banks, the Council of People's Commissaries has resolved :—

"1. To recognize that by the Decree of 14th December, 1917, there is established the principle of monopolization of banking in Russia by means of nationalization (or liquidation) of all the then existing private and public credit institutions.

"2. To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalization (or liquidation) of all still existing credit institutions.

"3. To direct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalization of banks and as to the position of banking."

And on December 2, 1918, the same Council passed the following further resolution :—

"RESOLUTION OF THE COUNCIL OF PEOPLE'S COMMISSARIES ON THE LIQUIDATION OF FOREIGN BANKS, DATED 2ND DECEMBER, 1918.

"All foreign banks operating within the confines of the Russian Socialist Federative Soviet Republic are to be liquidated. With regard to Russian joint stock banks, they come under the effect of the Decree of 14th December, 1917

(Collection of Enactments, 1918, No. 10, Article 150), irrespective of the nationality of their shareholders or depositors.

VL. ULIANOFF (LENIN),
Chairman of Council of People's Commissaries.
VL. BONTCH-BRUIEVITCH,
Administration of Affairs of Council of People's Commissaries."

On December 10, 1918, the People's Commissary of Finance issued instructions on the method of nationalization of private banks, which were expressed to be issued in pursuance of cl. 4 of the above-mentioned decree of December 14, 1917. These instructions declared that all private commercial banks, with their branches, agencies and commission agencies, were " subject to nationalization," and that such nationalization was to be carried out locally under the supervision of " special technical liquidation collegiums " to be appointed as therein mentioned. The liquidation of the " former private banks " was to take effect as from December 14, 1917.

The fourth " decree " relied upon in these proceedings was dated January 19, 1920, and was made by the Council of the People's Commissaries. It stated that " with the object of unification of the activities of the apparatus for estimates, settlement of accounts and cash operations " the Council had resolved (among other things) as follows :—

" (1.) To abolish the People's (State) Bank of the Russian Socialist Federal Soviet Republic with all the staffs of officials, establishments and institutions forming part thereof.

" (3.) To transfer all the assets and liabilities of the late People's Bank to the Central Budget and Accounts Administration."

My Lords, it is not an agreeable task for a British Court of Justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons " on the basis of complete confiscation." But the Soviet Government has been recognized by Great Britain as the lawful Government of Russia ; and this being so its decrees must, as Bankes L.J. said in

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Luther v. *Sagor & Co.* (1), be treated by the Courts of this country as binding so far as the jurisdiction of the Russian Government extends; and upon this basis I proceed to consider the effect of the decrees upon the continued existence of the appellant company.

My Lords, on the language of the decrees themselves, and apart from any evidence given by the expert witnesses called in this case, I am by no means satisfied that their effect was to dissolve the plaintiff corporation. The decree of December 14, 1917, is in very general terms, and reads more like a declaration of policy than a positive enactment which is to take immediate effect; and this construction of that decree is supported by the provision in cl. 4 that "the method of amalgamation of joint stock banks with the State bank shall be determined by a special decree." The decree of January 26, 1918, is inconsistent with the view that the joint stock banks had been dissolved in the previous December, for it provides for a transfer of the share capital and a surrender of the shares in those concerns. The notice issued by the principal Commissary of the People's Bank on April 12, 1918, shows that he, at all events, did not take the view that the private banks had been dissolved in the previous December, for he directed that their administration should be abolished as from April 1, 1918. The paragraph in the Constitution of July 10, 1918, relating to the passing of all banks into the ownership of the Workmen and Peasants' State, is even less definite than the decree of December and is inconsistent with it; for it omits all reference to the People's Bank and treats the private banks as passing directly into the ownership of the State. The resolutions of September 20 and December 2, 1918, and the instructions of December 10, 1918, are executive acts only; but so far as they go they support the view that the decree of the previous December contemplated a future and not an immediate supersession of the private banks, for they provide for a liquidation of those banks to be effected by the new machinery which is set up. Lastly, the decree of January 19, 1920,

(1) [1921] 3 K. B. 532.

carries the matter no further so far as the private banking companies are concerned, for its only effect is to abolish the People's State Bank and transfer its assets to the State. From these documents therefore I should be unable to draw the inference that the joint stock banking companies, including the plaintiff corporation, were dissolved by the decree of December, 1917; and no other decree is proved which could have directly produced that effect.

But it was argued on behalf of the respondents that, as the decree of January 26, 1918, declared that all bank shares should be null and void, the effect of that decree was to destroy the banking corporations; for "where there are no corporators there can be no corporation." This argument was forcibly urged, particularly by Mr. O'Hagan; but I do not think that it should prevail. The decree in question, though purporting to declare the shares null and void, proceeds to direct that they shall be surrendered to the State Bank under severe penalties; and it appears to me that the intention must have been that the State Bank should hold the surrendered shares and so control the banking corporations. If so, the corporations would continue to exist. Further, this so-called decree was, in fact, only an order or resolution of the Council of Commissaries, and does not appear to have been confirmed by any body having legislative authority. I am unable to understand how such an order could be effective to confiscate or destroy shares held by persons out of the jurisdiction of the Soviet Government; and as there were admittedly many such shares, the corporation cannot have wholly disappeared.

Passing to the evidence as to the construction of the decrees given by Russian lawyers in this case, I find that it rather increases than allays the doubts which I had felt on reading the original decrees. The expert witnesses called at the trial were Mons. Krougliakoff on behalf of the defendants, and Mons. Idelson and Mons. Halpern on behalf of the plaintiffs; but for the purposes of the appeal further evidence was obtained from Mons. Krougliakoff and Mons. Idelson, and a new legal witness, Mons. Thal, gave evidence for the

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defendants. Mons. Krougliakoff, a Russian lawyer practising in London, stated in his evidence in chief that by the decree of December, 1917, the plaintiff Bank was "abolished as a separate and private entity and was merged into the State Bank"; but in cross-examination he was disposed to say that the decree of December was a statement of policy only and that it was left to be afterwards determined whether the taking over of the banks should be on the basis of compensation or of simple confiscation. In his further evidence he admitted that the banks had not "ceased their existence in law" before the decree of January 26, 1918. Mons. Idelson, a Russian barrister and lecturer on banking law at the Peter the Great Polytechnic, Petrograd, stated emphatically that according to Russian law a Russian corporation could only be dissolved by a special law, and that in his opinion the plaintiff corporation was not dissolved by the decrees, but was still in existence. In his view the decree of December, 1917, was "obviously a declaration of policy and not a legislative act in the ordinary way." Mons. Halpern, an advocate of the Court of Appeal at Petrograd and legal adviser to the British Embassy there as well as to several banks, stated his opinion that the effect of the decree of December, 1917, was not to effect in law the dissolution of the private banks as corporate bodies, and that none of the other decrees had that effect. "In my opinion," he said, "the corporation of the Russian Commercial and Industrial Bank still exists and owns assets." In his further evidence he added that the notice of December, 1918, had not the force of a decree. The defendants' second expert witness, Mons. Thal, a Russian barrister who had been professor of commercial and civil law at the University of Moscow and had remained there until the end of 1921, gave some very guarded evidence. When asked in his examination in chief whether after their amalgamation in the People's Bank the private banks had any existence in contemplation of law, he replied:—

"In contemplation of law I think they had not. It is very difficult under such a new revolutionary condition to give an unqualified yes or no to that question; therefore,

I say, 'No.' But I must add that, in so far as outside the Soviet power there might still be maintained any portions of this property, the continuance as a matter of pure fact of such operations would result from the existing circumstances; but, from the juridical point of view, those could not create any right on the part of these negotiorum gestores to the property which they were managing. It is not a beneficial interest; it is not individually to themselves, but it regards them as having some right.

"*Q.* Have they any title in Russian law?—*A.* They could have by subsequent ratification of the State. If the State had subsequently said all transactions effected by you are recognised by us, then this subsequent ratification would have formed a juridical basis, but without that they have none."

This witness's cross-examination added little or nothing to the above somewhat cryptic reply. He appeared for a time to say that on losing its property and going into liquidation the plaintiff corporation ipso facto ceased to exist; but after an adjournment of the Court he made the following pronouncement:—

"During the lunch time I have had an opportunity of thinking over several of the questions put to me, and I think my answers might not have been clear, because I did not really think them sufficiently out myself. For instance, I was asked whether I think the loss by any Company of its property ipso facto causes the cessation of the Company; I answered 'Yes,' but I think not now. I think, in order that it should cease to exist as a juridical persona, there is need for either the act of some authority or other resolution on the subject; in my opinion, such act is represented by the Decree of January concerning the cancellation of the shares; that is one correction. Another correction is this: a further question was put to me whether I think that every juridical persona which is in a state of liquidation does not exist while in that state. I think that a juridical persona which finds itself by its own resolution in liquidation for the purpose of its determination still possesses a certain limited legal capacity,

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namely, only that limited capacity which is necessary for the purpose of those actions requisite to put an end to it, but outside these limits it no longer possesses its legal capacity; that is the view of science and practice; I think that is this present case. In this bank there was no liquidation in the sense of a voluntary termination of its own existence, but, by the Soviet laws, a different mode of legislation is laid down, namely, the conversion for the future into branches of the People's Bank; therefore, in so far as the law uses the term 'liquidation,' that does not mean their destruction, but the carrying through of all the operations relating to their previous existence; so that, in the present case, the liquidator is not the Company itself, the Company has ceased to exist and the liquidation is carried out by someone else."

This hesitating and obscure statement appears to be the high-water mark of the defendants' evidence as to the dissolution of the plaintiff company; and having carefully considered it, I am still far from being convinced that the defendants have proved—as in order to succeed they must prove—that the plaintiff corporation has ceased to exist.

There is another class of evidence to be considered—namely, evidence showing the conduct of the Soviet Government—which has a bearing on the proposal that the plaintiff Bank has been dissolved. In this connection the resolutions and instructions of the executive in September and December, 1918, which have already been referred to, are significant; but apart from these documents the dealings of the Russian Government and its State Bank with the English branch of the appellant Bank after the date of its alleged dissolution raise a strong presumption that the Russian Government did not look upon the plaintiff Bank as wholly extinct. These dealings were described by Atkin L.J. in his careful and lucid judgment, and need not here be stated in detail. It will be sufficient to quote the following conclusions from the judgment of the learned Lord Justice (1): "During the course of 1918, long after the alleged dissolution of the bank, the London branch was communicating in its corporate name with the

(1) [1923] 2 K. B. 665.

head office at Petrograd, and receiving communications from Petrograd, each honouring orders addressed by the one to the other. It is true that the Petrograd branch signs 'Formerly the Russian Commercial and Industrial Bank, Liquidating Committee,' or describes itself as a branch of the State Bank, and sometimes but not always describes the London branch as a branch of the State Bank; but there is no suggestion of any lack of continuity, the old name is retained in formal documents, while in communications from Moscow the Moscow Commissary addresses himself to the Russian Commercial and Industrial Bank." Similar evidence continuing down to the year 1922 was given as to the dealings of the Russian Government with another Russian banking corporation, the Russian Asiatic Bank, which was not less affected than the plaintiff Bank by the decrees on which the defendants relied. Having regard to these transactions it is impossible to avoid the conclusion that the Soviet Government desired to have the benefit of the operations of the plaintiff Bank in England and elsewhere abroad, and for that purpose treated it as having a continuous existence as a corporation.

Upon the whole matter I have come to the same conclusion as that which was reached by Atkin L.J.—namely, that the defendants have not established their plea that the plaintiff corporation no longer exists.

2. The allegation that by virtue of the Russian decrees the property and rights of the plaintiff corporation (including the bonds in dispute) had been transferred to and vested in the People's State Bank, or in their successors the Russian Government, is found in the defence in this action; but so far as the bonds are concerned it was not supported by any arguments before your Lordships. Indeed counsel for the defendants deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country; and it is therefore unnecessary to deal with this question. But it is desirable to add that neither the Russian State Bank nor the Russian Government has (so far as the evidence shows) made any claim whatever to the bonds in dispute or otherwise intervened in any way;

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and this being so, it is not open to the defendants, who received the bonds from the plaintiff bank, to set up an adverse claim as existing in a third person except on behalf of and by the authority of that person: see *Rogers, Sons & Co.* v. *Lambert & Co.* (1)

3. But it is said that, assuming the plaintiff bank still to have a corporate existence, yet, having regard to the transfer of the undertaking of the bank to the State Bank, and afterwards to the Soviet Government, and to the suppression of the board of administration of the plaintiff Bank, the authority given by that bank to Mr. Jones by his power of attorney must be deemed to have been revoked, and accordingly that he had no authority to claim or receive the bonds or to commence this action.

My Lords, I do not think that it is open to the defendants to raise this question by way of defence to the action. If the defendants desired to dispute the authority of Mr. Jones to commence these proceedings in the name of the plaintiff company, their proper course was to move at an early stage of the action to have the name of the company struck out as plaintiff and so to bring the proceedings to an end. The decision of Warrington J. to that effect in *Richmond* v. *Branson & Son* (2) is not affected by the decision of your Lordships' House in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (3), where the alleged plaintiff was incapable of giving any retainer at all. The same observation applies to the suggestion that, as the arrangement for the loan was made with the plaintiff's head office, these proceedings could only be brought by the authority of that office. The plaintiff company and its branches are one, and with the authority given for these proceedings the defendants are not concerned.

But there is another answer to this plea. The power of attorney given by the plaintiff company to Mr. Jones contained the following clause: "And the Bank hereby ratifies and confirms and agrees to ratify and confirm all and whatsoever the Acting Manager pro tem. shall legally do or cause

(1) [1891] 1 Q. B. 318. (2) [1914] 1 Ch. 968.
(3) [1916] 2 A. C. 307.

to be done by virtue of these presents including in such confirmation whatsoever may be legally done between the date of revocation by any means of these presents and the time of such revocation becoming known to the Acting Manager pro tem."

Now it may well be that, if in the year 1920, when the bonds were claimed and this action was commenced, Mr. Jones had known all the facts which have been disclosed in the evidence in these proceedings, he would have felt considerable difficulty in acting under his power of attorney. But the evidence shows that he had not then any such knowledge as should have led him to infer that his authority had been revoked, and that on the contrary he had been treated throughout by the authorities in Russia as a person entitled to continue to carry on the business of the London branch. Further, it was only after this action had been commenced that the Soviet Government was recognized by Great Britain as the de facto Government of Russia, and until that event happened Mr. Jones could not be satisfied that any act of that Government could effectually determine his authority. This being so, the revocation (if any) of Mr. Jones' authority had not then "become known" to him, and the acts done by him in purported exercise of his authority were, as between himself and his principal, valid and effective. Any difficulty which might now exist in delivering the bonds to Mr. Jones is removed by the winding-up order and the appointment of the official receiver as liquidator.

It was argued that the winding-up order was void, as by reason of the order of January 26, 1918, the company had no shareholders; but it is plain that there were many English shareholders, and in my opinion the order of January, 1918, did not effectively confiscate their shares.

4. There remains the plaintiffs' plea of estoppel, and I think that it is sound. The Mulhouse Bank, with all the knowledge which they now have, agreed with the London branch of the plaintiffs' Bank to receive payment of 1,090,000 marks and to deliver up the bonds; and having received the sum agreed upon they cannot now be heard to dispute the

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authority of the London branch to receive the bonds which were to be delivered in exchange for it: see *Roe* v. *Mutual Loan Fund*. (1) It is stated that some time after the receipt of the 1,090,000 marks, when the value of the mark had greatly depreciated, an offer was made to return to the London branch the same sum in marks, and was refused; but no such offer is pleaded, and if made it was wholly illusory.

For the above reasons I have come to the conclusion that the defences set up by the defendants fail and that the plaintiff Bank is entitled to a return of the bonds. I am therefore of opinion that this appeal should be allowed, that the orders of Sankey J. and the Court of Appeal should be set aside, and that judgment should be entered for the appellants for the relief which they claim with costs here and below, and I move your Lordships accordingly.

VISCOUNT FINLAY (read by LORD SUMNER). My Lords, the Russian Commercial and Industrial Bank was incorporated in Russia in 1889 as a joint stock company for banking business. The head office was in St. Petersburg; there were various branches in Russia and abroad; one of them was at Odessa, another in Paris and a third in London. Le Comptoir d'Escompte de Mulhouse, the first respondent, carried on business at Mulhouse, and appears to have been closely associated with the Banque Nationale de Crédit, a French bank.

In January, 1914, the London branch of the Russian Commercial and Industrial Bank deposited with the respondents, the London County Westminster and Parr's Bank, certain bonds: 29,000*l*. Chinese 5 per cent. 1912 bonds and 29,000*l*. United States of Brazil 4 per cent. bonds. The bonds so deposited had been in the custody of the London branch, and were handed over by the manager of that branch on the terms that the coupons were to be remitted as they became due to the London branch of the Russian Bank and that the bonds were to be held by the London and Westminster Bank to the order of the Mulhouse Bank as security

(1) 19 Q. B. D. 347.

for advances made by the Mulhouse Bank to the appellants, and the dividends on the bonds were to be credited to the Russian Commercial and Industrial Bank at their London office. This arrangement went on till 1919, when Mr. Jones, the manager of the London branch of the Russian Bank, paid off the loan, which was fixed by agreement at 1,090,000 marks. The money was duly paid, but the bonds were not returned, and this action was brought on January 23, 1920, to recover them. Pleadings were delivered, but before the case came on for trial there took place in May, 1921, the recognition by Great Britain of the Soviet Government. The defendants in the action applied for an adjournment in order to enable them to amend the pleadings, so as to raise the defence that by the legislation of the Soviet Government the Russian Commercial and Industrial Bank had ceased to exist. The adjournment was granted, and the amended defence, delivered on June 15, 1921, contained the following paragraphs :—

" 10. The defendants say that the persons suing herein are an unincorporated body of persons and have adopted the style or title of the Russian Commercial and Industrial Bank, but have no right to the property of or to claim under agreements made with the said Corporation.

" 11. The said Corporation has in fact ceased to exist by reason of the matters aforesaid."

The case now turns substantially on the question whether this allegation, that the corporation in whose name the action is brought had in fact ceased to exist, is established.

Mr. Jones, the manager of the London branch of the Russian Bank, held a power of attorney from the Russian Bank dated November 20, 1914, and under this power he carried on the business of the bank in London until a provisional liquidator was appointed in February, 1922.

Sankey J., on February 23, 1922, delivered judgment in favour of the defendants. He based his judgment chiefly on the finding that, having regard to the facts which had supervened and to the complete change of circumstances, Mr. Jones' power of attorney had become exhausted either

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because the Russian Bank had ceased to exist or because a state of circumstances had supervened which was never contemplated at the time the power of attorney was given and to which the power of attorney was not applicable: Appendix, vol. i., p. 27, letter I.

An appeal was brought, and the Court of Appeal by a majority (Bankes and Scrutton L.JJ.) dismissed the appeal. Atkin L.J. differed, as he was of opinion that judgment should be entered for the plaintiff in the action, with costs.

As I have said, the great question in the case is whether the bank in whose name the action is brought still exists as a corporation, and the first point to be investigated is the effect of the legislation of the Soviet Government—has it terminated the existence of the plaintiff company? We have before us an agreed translation of the Russian decrees and orders and the evidence of eminent Russian lawyers as to their effect, upon which there is an acute difference of opinion among the expert witnesses.

I shall first examine the decrees themselves, and then consider the expert evidence as to their effect.

The first decree is that of December 14, 1917: Appendix, vol. ii., p. 150, letters C to F. It runs as follows: [His Lordship read the decree, which is set out in the opinion of Viscount Cave.]

It seems to me that this decree did not put an end to the existence of the Russian Commercial and Industrial Bank. The decree is largely in the nature of a manifesto in its provisions as well as in its preamble. The preamble speaks for itself, and I proceed to the consideration of the operative clauses. By them banking is declared a State monopoly (cl. 1). This assertion of principle is followed by the statement (cl. 2) that all existing joint stock banks are amalgamated with the State Bank. The third clause provides that the assets and liabilities of the liquidated banks are taken over by the State Bank. Clause 4 announces that the method of amalgamation shall be determined by a special decree, and cl. 5 states that the management of a joint stock bank is temporarily placed in the charge of the Council of the State

Bank. The sixth, and last, clause is this: "The interests of small investors shall be fully safeguarded."

It is obvious that the method in which the amalgamation contemplated by cl. 4 should be carried out is for the present purpose all important. We have not before us any special decree such as is spoken of in that clause, but we have a document entitled "Instructions approved by the People's Commissary of Finance on the 10th December 1918 on the Method of Nationalization of Private Banks": Appendix, vol. ii., p. 169, letter F. These instructions begin by referring to the fourth clause of the decree of December 14, 1917 (cl. 1). The second clause is as follows: "Under nationalization, referred to in Clause 1, must be understood not only the transfer of credit institutions out of the hands of private owners into the hands of the State by means of amalgamating them with the State (People's) Bank, but also the reorganization of the activities of such institutions on new principles in accordance with the tasks imposed by the conditions of the present social order on the People's Bank of the Russian Socialist Federative Soviet Republic."

The first sentence of the third clause is this: "All private commercial banks with their branches, agencies and commission agencies are subject to nationalization"; and cl. 3 then goes on to provide for the carrying out of nationalization of private banks locally under "special technical liquidation collegiums."

Clause 5 is as follows: "In those towns where besides the establishments of the former State Bank there is only one establishment of a private bank, the latter is subject to liquidation; in the towns with two or several affiliated branches of private banks all such branches are amalgamated into one or several branches, in accordance with local requirements. In any case, if local economic conditions call forth a necessity of opening more than one affiliated branch of the People's Bank, then the fundamental branch (office) must make an application to this effect, stating its reasons, to the Central Administration of the People's Bank." Clause 6 provides that December 14, 1917, is to be the initial date

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to which the liquidation of former private banks is to be referred. Clause 7 provides that the liquidation balance sheet shall be made up on December 14, 1917. Clause 10 makes provision for the form of balance sheet to be returned, and cl. 21 provides for preservation of the rights of mortgagors, a note being appended "Securities are not to be returned."

These instructions are a somewhat lengthy document, extending from pp. 169–174 in Appendix, vol. ii. I think it appears, from the general tenor of the document, and especially from the clauses to which I have referred above, that these instructions were intended to deal with banks in Russia and do not apply to, and are not intended to apply to, branches in foreign countries, such as those in London and Paris. But further, it is obvious that "amalgamation" might be carried out without destroying the existence of the corporations which are amalgamated. These instructions do not show that such destruction was involved in the amalgamation, and there is no "special decree" such as was indicated in the decree of December 14, 1917. It is, in my opinion, not established that that decree, either with or without the instructions, put an end to the existence of the Russian Bank.

The decree of December 14, 1917, was followed by another issued in January, 1918. It is a decree of the Council of the People's Commissaries, and is dated January 26: Appendix, vol. ii., pp. 150 and 151. This second decree declares the transfer to the State Bank on the basis of complete confiscation of all share capital stock in the former joint stock banks. It further declares all bank shares null and void and stops the payment of all dividends: cl. 2. All bank shares are to be forthwith surrendered to the local branches of the State Bank: cl. 3. Particulars must be furnished to the State Bank of the locality of all shares which cannot be produced: cl. 4. The holders of the bank shares who have failed to comply with clauses 3 and 4 within two weeks are to be punished with confiscation of all their property: cl. 5; and, finally, all transactions and deeds of transfer

referring to bank shares are prohibited under penalty of imprisonment up to three years.

Whatever may have been the effect of this decree in the territory under the control of the Soviet Government, it appears to me that it cannot be regarded as applicable to such branches as those which were carrying on business in London and in Paris.

The same observation applies to the document which will be found in vol. ii. of the Appendix, entitled "State Organization": pp. 152–168. This appears to be a statement of the Constitution of the Soviet Republic adopted on July 10, 1918, by the Fifth All-Russian Congress of Soviets. This document (ch. 2, p. 152) begins by stating that the Congress sets itself as its fundamental task the destruction of all exploitation of man by man, and the complete elimination of the division of society into classes, the establishment of a Socialist organization of society and the victory of Socialism in all countries, and proceeds to make special provisions under heads (*a*) to (*g*). For the present purpose only head (*e*) need be noticed. It runs thus: "There is confirmed the passing of all banks into the ownership of the Workmen-Peasants State as one of the conditions of the emancipation of the labouring masses from beneath the yoke of capital."

At p. 168 of the same volume there is another document entitled "Resolution of the Council of the People's Commissaries, dated 20th September, 1918, on the Undeviating Enforcement of the Decree of Monopolization of Banking." It recognizes (cl. 1) that by the decree of December 14, 1917, there is established the principle of monopolization of banking by liquidation of all still existing private and public credit institutions.

Another decree has been supplied to us: "Decree of the Council of People's Commissaries," dated January 19, 1920: Appendix, vol. ii., pp. 174, 175; but this appears merely to refer to the organization in Russia of the machinery for dealing with banking matters, and not to be relevant to the present inquiry.

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Neither of the documents last mentioned appear to have any bearing upon the position of the bank branches in England or France.

As I have said, evidence was called on both sides as to the effect which these various documents have according to Russian law upon the continued existence in point of law of the Russian Commercial and Industrial Bank.

For the plaintiffs in the action, evidence was given by Dr. Idelson and M. Halpern. Both of these gentlemen gave their evidence before Sankey J. at the trial in 1921. I desire to quote what the learned judge said of Dr. Idelson: Appendix, vol. i., p. 24, line 1 to B: "Upon this question several Russian lawyers of great eminence gave evidence. I was particularly impressed by that given by Dr. Idelson, who was a member of the Council of the Ministry of Finance, and held the Chair of Banking in the Imperial Peter the Great Polytechnic from 1906–1918. He gave it excellently, but appreciated the difficulty of applying any principles of law, as we understand it, to what has taken place in Russia. It is not easy to apply the canons derived from the wisdom of the Ages to the hasty experiments of the moment." This passage records the impression of the judge who heard and saw the witnesses as to Dr. Idelson's trustworthiness and ability, and in it the learned judge puts his finger upon the difficulty of dealing with such legislation as this on the ordinary lines, which would apply to legislation in a European country under normal circumstances.

Dr. Idelson was asked whether the effect of the Soviet legislation in the various decrees was to destroy the entity of this bank in Russia. He replies (Appendix, vol. i., p. 153 F): "In this case the Russian Commercial and Industrial Bank, a limited company, was deprived of its rights to carry on banking business within the jurisdiction of the Bolshevik Authorities, but the limited company is still in existence because, as I have already explained, a corporation aggregate under Russian law cannot die by simply taking out of the till of that corporation certain securities or passing certain laws which prohibit the corporation within certain boundaries

to carry on this or that business that it has been carrying on before." Sankey J. then asked him: "You say the bank has not entirely ceased to exist?" Answer: "The limited company under the style of the Russian Commercial and Industrial Bank is still in existence": p. 153 H.

On p. 154 (letter H) the witness says that while the Government has seized assets of the banks it has not taken over their liabilities and (p. 155, F to I) that the corporation continues to exist.

M. Halpern, an advocate of the Court of Appeal in Petrograd and legal adviser to His Britannic Majesty's Embassy at Petrograd, who is familiar with banking business, also gives evidence to the same effect: Appendix, vol. i., p. 169. He is asked about the decree of December 14, 1917, and says: "I do not think that its effect in law was the destruction of the private banks as corporate bodies." With regard to the decree of January 26, 1918, he said that in his view the legal entity still exists while the share capital was transferred to the State Bank: Appendix, vol. i., p. 170, letter C to letter F. He is referred to other decrees, and on p. 172 (letter H to I) says that in his view the Corporation of the Russian Commercial and Industrial Bank still exists and owns assets, and adds that he regards such decrees as having purely territorial effect: Appendix, vol. i., p. 173, letters A, B and C.

Dr. Idelson gave evidence of the same nature in his deposition when further evidence was called for in the Court of Appeal: vol. ii., pp. 3–44.

Dr. Krougliakoff and Dr. Thal were called as experts on the other side.

Dr. Krougliakoff gave evidence at the trial (vol. i., pp. 113–138 and pp. 177–179), and made a deposition on examination under Commission (vol. ii., pp. 46–93). He said on the former of these occasions (vol. i., p. 116 G) that the effect of the decrees was that the bank was abolished as a separate and private entity and was merged into the State Bank, which was then called the "People's Bank," and at p. 117 he says that the effect of the abolition of the Russian Commercial

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and Industrial Bank was to abolish also the power of attorney which it had issued.

Louis Thal, who had been Professor of Commercial and Civil Law at Moscow, a member of the Russian Bar and a member of the Senate for Commercial cases, also gave evidence for the respondents on commission. His deposition is in vol. ii., pp. 93–133. Dr. Thal gave it as his opinion that the joint stock banks no longer exist as legal entities, but spoke of them as converted into portions of the National Bank: vol. ii., p. 96 D and p. 97. When he was asked whether the banks had, after such conversion, any existence in contemplation by law, he said (vol. ii., p. 97 F et seq to p. 98 B): "In contemplation of law I think they had not. It is very difficult under such a new revolutionary condition to give an unqualified yes or no to that question; therefore, I say, 'No,' but I must add that in so far as outside the Soviet power, there might still be maintained any portions of this property, the continuance as a matter of pure fact of such operations would result from the existing circumstances, but, from the juridical point of view, those could not create any right on the part of these negotiorum gestores to the property which they were managing; it is not a beneficial interest; it is not individually to themselves, but it regards them as having some right.

"*Q.* Have they any title in Russian law?—*A.* They could have by subsequent ratification of the State. If the State had subsequently said all transactions effected by you are recognized by us, then this subsequent ratification would have formed a juridical basis, but without that they have none."

A great deal of the evidence on this head is very involved and obscure, and I do not think that anything would be gained by an attempt to abstract it.

As I have said, Bankes and Scrutton L.JJ. were of the opinion that the effect of the decrees was to put an end to the existence of the Russian Commercial and Industrial Bank, and on this ground they affirmed the judgment of Sankey J. in favour of the defendants.

The effect of the Soviet legislation is, to my mind, somewhat obscure, and I certainly am not prepared to assent to the proposition that the effect of the decrees has been to put an end to the existence of the Russian Bank. The burthen of proving that the plaintiff bank had ceased to exist is upon the defendants, who assert the demise of the corporation, and, in my opinion, it has not been satisfactorily established. But considerable light is thrown upon the problem by the narrative of what took place in fact. It is from this point of view that Atkin L.J. treats the case in his dissenting judgment. I desire to refer to his judgment on this subject (vol. i., pp. 60–64), and I agree with his conclusion, which is as follows (1): "For the above reasons I have come to the conclusion that the defendants have not established their plea that the plaintiff corporation no longer exists. I venture to think that their witnesses have assumed too readily that nationalization involves extinction, and have not given sufficient weight to the consideration that a business may be nationalized or amalgamated without the persons who owned the business being extinguished."

It must never be forgotten that here we have to deal with a branch of the bank established and carrying on business in this country. Even if it had been demonstrated that the Russian Bank had, so far as Russia was concerned, ceased to exist, I should not treat that as decisive in this case. The London branch has existed for a long time, it has carried on business here, there are many English shareholders, liabilities to British subjects have come into existence. It carries on business here now just as the French branch does in Paris. To affirm the defence set up by the defendants in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets. If there is any other body or person having a preferential right to these securities a claim may be made in the winding up in this country. But it is clear that the Comptoir d'Escompte de Mulhouse, having

(1) [1923] 2 K. B. 670

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been paid the 1,090,000 marks, has no right to retain the securities too; the securities should be returned to the London branch by which they were lodged and which is suing in this action for their recovery, having paid off the debt.

Even if the power of attorney originally given to Mr. Jones should be regarded as at an end, I think the circumstances are such as to authorize those in control of the English branch to take the steps necessary for getting in the assets and discharging the liabilities of the branch.

In my opinion, judgment should be entered for the appellants with costs here and below.

LORD ATKINSON. My Lords, the facts of this case have been fully stated by my noble friend who has preceded me. I will not attempt to deal with them at any length.

I find in the able and, to me, convincing judgment of Atkin L.J., the following passage containing a succinct and accurate description of the real nature of this case. He said (1): "In the result this case resolves itself into the simple position of a claim against a mortgagee who has been paid off and who holds both the security and the sum repaid."

This position is defended on the ground that, where bonds are deposited with a bank to secure a particular advance, and the amount of the advance is subsequently paid to this same bank by one purporting to be the agent of the bailor duly authorised to pay it for and on behalf of his principal, it is competent for the bank to receive from the agent the money in the character and for the purpose for which it is paid, and at the same time to refuse to deliver up to this agent the bonds pledged to secure the payment of the very debt the latter has discharged, on the ground that, though the bank has by accepting the payment from the agent treated him as a person having lawful authority from an existing principal to pay the latter's debt, yet, in the matter of obtaining possession of the bonds so pledged, the principal may be treated as dead, extinct, incapable of appointing an agent or giving him authority to do anything.

(1) [1923] 2 K. B. 674.

Stripped of all sophistry and contention as to the meaning and force of certain decrees of the Soviet Government, this is really the right claimed by the Mulhouse Bank. It is about as audacious an attempt to, at the same time, approbate and reprobate a given transaction, as could well be imagined. It was urged in argument that the defendant bank had offered to refund the money paid them. The time at and the circumstances under which the offer was made are not stated.

It may possibly be that it was after they had discovered that the device of approbating and reprobating a given transaction was not, in the Courts of law in this country, very successful in defeating just claims.

The substance of the evidence given on behalf of the defendants was that the Soviet Government had by two decrees, dated respectively December 14, 1917, and January 26, 1918, not only acquired the business and assets of the Russian Commercial and Industrial Bank (a banking corporation having its head office in Petrograd and branches in London, Paris and Berlin), taken over its administration and annulled the rights of its shareholders, but had in addition dissolved the legal entity, and completely terminated its existence, so as to make it incapable of being an actor in a suit, or appointing an agent to take proceedings on its behalf or in its interest.

The agreement, in pursuance of which the bonds, the subject matter of this proceeding, were deposited, bore date the month of January, 1914. The bonds were actually deposited with the London and Westminster Bank about the same time, and the debt the bonds were deposited to secure was paid off on or about December 22, 1919, one year and ten months after February 12, 1918, the date of the Order of the Principal Commissioner of the People's Bank so much relied upon. The revolution in Russia did not break out till the month of November, 1917, and the Soviet Government was not recognized by His Majesty's Government till May, 1921. This recognition is presumed to have been retrospective in its operation and effect. It is essential to

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consider how the business of the London branch of this bank was carried on from, at all events, the time when the deposit of the deeds was made, the parent corporation being then alive, and apparently in vigorous health and activity, and how that same business was carried on after the parent institution was, as is contended, dead, dissolved and had ceased to be.

Atkin L.J. deals with this matter ably and exhaustively in his judgment. (1)

He shows conclusively, I think, that several of the branches of this Russian Bank were not only communicating and doing banking business with each other, but with the parent institution itself, long after the latter's alleged decease. It is said that "even in our ashes live their wonted fires," but a dead and dissolved bank having live and active branches with which it transacts banking business is rather incomprehensible. The inference to be drawn from what has occurred would seem to me to be that none of the parties concerned, the Head Office of the Russian Bank in Petrograd, its various branches, or the banking institutions with which they severally dealt, ever regarded the parent institution as defunct, unable to appoint an agent, or to do business through and by the aid of such an officer. The London branch knew presumably that the parent institution had been spoliated by the above-mentioned decrees, but it could not, it would appear to me, have ever considered that it had been annihilated or the branch would not have acted as it has done.

The burden of proving that the entity—the parent banking institution in Petrograd—was annihilated and destroyed, that it had ceased to exist as a business entity, rests upon the respondents. It has been proved by the evidence given on behalf of the appellants that the dissolution of a corporation like that of the Russian Bank could only be effected by an express statutory enactment. Russian lawyers were examined on both sides upon this point. They were directly opposed to each other in opinion, those examined on behalf of the respondents being of opinion that the effect

(1) [1923] 2 K. B. 665–669.

of the decrees was to extinguish the Russian Bank, while those examined for the appellants were of opinion that, in spite of the decrees mentioned, this bank maintained its existence as a legal entity.

Having regard to this evidence, I do not think it is competent for an English tribunal to hold that each of these decrees is ex facie, according to Russian law, clear and unambiguous in its meaning, or, if properly construed, would be precise and certain in its operation and effect. It is in my view essential, in order to find out what it was designed according to the Russian law to effect by those decrees, to have regard to what was done under them by the parties concerned, what kinds of business transactions between those parties were carried on after the decrees were respectively made. It is more rational, it would appear to me, to hold that the banking and other business carried on, subsequently to the date of these decrees, by the parties concerned was permissible according to Russian law than to hold that it was carried on in violation of the prohibitions contained in the decrees. If that be so, as I think it is, then the business so carried on by its very existence and nature affords help in the construction of the decrees as legal documents. Atkin L.J. has collected and described these transactions in the passages of his judgment to which I have already referred. I thoroughly agree with him as to their significance and effect. The detailed examination of them, coupled with that of the decrees and orders actually made by the Soviet Government, has convinced me that the respondents have, as to this part of their case, utterly failed to discharge the burden of proof already mentioned, which, in my view, at all events, indubitably lay upon them.

I think they have failed to prove their plea that the plaintiff corporation has ceased to exist. Till that is established, it must be taken that the corporation exists as a juridical person capable of instituting such an action as the present in this country. The minor question, or one of the minor questions, remaining for decision is as to whether Mr. Jones, the manager of the London branch of the plaintiff corporation, had, as agent

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of that corporation, authority to institute the present action. The power of attorney executed by the Russian Bank bears date October 7, 1914. It purports to be executed by the board of directors of the Russian Commercial Industrial Bank, thereinafter styled "the Board." In it Mr. Jones is styled "the acting manager" pro tem. in London, to carry on, in the name of this bank, in accordance with the fourteenth article of its articles of association, the operations therein described, in the United Kingdom. It conferred upon this acting manager very wide and important powers, amongst others the following :—

"(1.) To direct and superintend the business affairs of the bank (i.e., the Russian Commercial and Industrial Bank) in the United Kingdom in accordance with the instructions and orders of the Board, and the provisions of the articles of association of the bank," and

"(2.) to represent the bank whether as plaintiff or defendant in connection with any litigation in which the bank may in any way be interested before any tribunal or court and to appoint on behalf of the bank such solicitors, counsel and other professional persons or person to prosecute or defend any action, suits or other proceedings, and generally in connection with the affairs of the bank, and any such appointment at pleasure to revoke and to appoint another or others in the place of the party or parties so removed."

No date is expressly named at which this power of attorney is to be taken to be revoked or to expire, but by its last clause it is provided that "the bank ratifies and confirms and agrees to ratify and confirm all and whatsoever the acting manager pro tem. shall legally do or cause to be done by virtue of these presents, including in such confirmation whatever shall be legally done between the date of revocation by any means of these presents and the time of such revocation becoming known to the acting manager pro tem." It is not pretended that the authority of the manager was ever expressly revoked either by the directors of the State Bank or by the Soviet Government. But it is contended apparently, on the evidence of the expert Russian lawyer, Mr. Krougliakoff, called as a

witness on behalf of the respondents, that the decree of January, 1920, did in effect work a revocation of this power of attorney. That is presumably a question to be determined by Russian law. But even if the decree had this effect, the revocation it worked would come within the last clause of the power, since the words used are "Revocation by any means."

The powers of the acting manager, therefore, continued until the revocation became known to him, which could not have been before May, 1921, when the English Government for the first time recognized the Soviet Government—that is, more than twelve months after the present suit had been instituted, eleven months after the respondents had filed their defence, and one month after that defence was amended. The question remains whether, even though the authority of the acting manager was by implication revoked in the manner described, it was not renewed by the new authority, the Soviet Government, which had become responsible for the management and administration of the affairs of the bank. Atkin L.J. deals with this point, so convincingly to my mind, in a passage of his judgment. (1) I cannot do better than quote it verbatim. It runs thus: "In the second place, even if the authority had been revoked, it appears to me plain that it was renewed by the new authority responsible for the administration of the affairs of the bank. That the Soviet Government knew that there was a London branch is obvious, that they knew that it was continuing to carry on business in the name of the Russian Bank is established by the correspondence to some of which I have already referred, and also by the fact that they intended it to carry on business. Indeed, without this correspondence I should have drawn that inference from the knowledge of the existence of the branch and the knowledge of the nature of banking business. They reply to letters written by Mr. Jones on behalf of the bank and accept his business directions. They must be deemed to have intended that some one should carry on the business of the bank in this country, and in the ordinary case

(1) [1923] 2 K. B. 671.

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of a private principal I cannot conceive of any one refusing to draw the inference that authority was impliedly given to the former manager to carry on as before with the former authority. Such an inference under the circumstances would, in my judgment, be a matter of course if we were dealing with an official liquidator or receiver and manager in Russia permitting a branch to be continued here, and I refuse to draw a different inference merely because we are dealing with a foreign Government."

I also concur in opinion with Atkin L.J.: (1.) that on the authority of *Richmond* v. *Branson & Son* (1) the point of want of authority to sue is not open to the respondents as a defence to this action, and (2.) that the French Bank (the respondents) having received the bonds from the Russian Bank is estopped from raising a jus tertii except on behalf of a third person named and with the authority of that person whose right of property is set up: *Rogers, Sons & Co.* v. *Lambert & Co.* (2)

I am of opinion that the appeal succeeds, and that judgment should be given for the plaintiffs for the relief claimed with costs.

LORD SUMNER. My Lords, I have had the opportunity of reading the opinion of my noble and learned friend on the Woolsack and I entirely agree with it.

LORD WRENBURY. My Lords, I am of opinion with your Lordships that this appeal succeeds, and I concur in the reasoning upon which that conclusion is based. Had I been of a different opinion as regards the operation of the Soviet decrees and had I thought that those decrees had an effect beyond that of taking over, amalgamating, and absorbing the private banks in Russia and extended to extinguishing and determining altogether the existence of the Russian corporation, there would have emerged another question upon which the appeal might have fallen to be decided and upon which I should have desired to hear argument. There is no question but that according to

(1) [1914] 1 Ch. 968. (2) [1891] 1 Q. B. 318.

private international law and according to the comity of nations a foreign corporation is for many purposes recognized as a corporation here. It may sue and be sued here in its corporate name. But there is also no question but that a corporation created under a foreign law is not a corporation within our law. The foreign corporation which establishes itself in trade in this country is an unregistered company within s. 268 of the Companies Act, 1908, and may be wound up as an unregistered company. The question which arises is whether the association of persons which is in the foreign country bound together by a nexus of corporation is not in this country an association of natural persons bound together by a nexus of partnership but not corporate. No objection arises by reason of the association consisting of more than ten persons, for the word "formed" in s. 1 of the Companies Act, 1908, means "formed in this country," and the association was in such a case "formed" abroad by incorporation there. The question then is whether the association is not to be treated here as an association or partnership of natural persons whose relations inter se are to be found in the articles of association of the company and are to be ascertained no doubt with reference to the lex loci contractus, but which is nevertheless an association whose existence is not terminated by the death of the foreign corporation, but continues for the purpose of winding up its affairs so far as this country has control over the persons and the assets within its jurisdiction. The natural persons forming such an association are not dead even if the corporation is. It is settled that a company which is a foreign corporation can be wound up here, and even if the corporation had been "dissolved" in the foreign country, I should have wished to hear argument upon s. 268 of the Companies Act, 1908, whether after the "dissolution" in the foreign country it would not be good ground for winding it up here that it had been dissolved and fell within the words in s. 268, which provide that an unregistered company may be wound up "(*a*) if the company is dissolved."

My Lords, I have desired to add these few words to

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protect myself in case the above question should arise hereafter. It has been unnecessary now to determine the question, having regard to the course which the case took upon other grounds.

Order of the Court of Appeal reversed, and judgment entered for the appellants for the relief claimed. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 22, 1924.

Solicitors for the appellants: *The Solicitor, Board of Trade; Freshfields, Leese & Munns.*

Solicitors for the respondents: *Donald McMillan & Mott.*

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H. L. (E.)* 1924 *July* 22.

BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD . . . . } APPELLANTS;

AND

GOUKASSOW . . . . . RESPONDENT.

Banker—Foreign Corporation—Russian Bank—Paris Branch—Action against Customer by Paris Branch Manager in Name of Bank—Right to sue—Nationalization of Banking by Decree of Soviet Government—Effect of Decree on Branch Manager's Authority.

A Russian bank having a head office in Petrograd and a branch in Paris had, through its Paris branch, a series of financial transactions with a customer as the result of which the customer was largely indebted to the bank. In 1920 the Paris manager brought an action in the name of the bank against the customer to recover the amount of the debt. The defendant pleaded that by virtue of the nationalization of the Russian banks under decrees of the Soviet Government the

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* *Present:* VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

plaintiff bank had ceased to exist, and that no one had authority to sue in the name of the bank :—

Held, that the case was governed by *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, ante, p. 112, and that the defence failed.

Decision of the Court of Appeal [1923] 2 K. B. 682 reversed.

APPEAL from an order of the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) (1) affirming a judgment of Swift J.

The facts are fully stated in the report before the Court of Appeal and sufficiently appear from the opinion of Viscount Cave. Counsel adopted the arguments in the previous case.

1924. May 20. *Neilson K.C.* (with him *Harold L. Murphy*) for the appellants.

Stuart Bevan K.C. and *Raynor Goddard K.C.* for the respondent cited *Rex* v. *Pasmore*. (2)

Neilson K.C. replied.

The House took time for consideration.

1924. July 22. VISCOUNT CAVE. My Lords, the essential facts of this case are similar to those which were discussed in the case of the *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse*, in which your Lordships have just given your decision ; and the decision in that case governs the present appeal.

The appellants are a Russian joint stock banking company with a head office in Petrograd and a branch in Paris. Over a period of years commencing in 1912 the appellants through their Paris branch had financial transactions with the respondent, as the result of which the respondent's account with the bank showed in December, 1920, a debit balance equivalent to 44,396*l.* 11*s.* 3*d.* On December 15, 1920, the writ in this action claiming that amount was issued in the name of the appellant bank on the instructions of Mons. Jecquier, the manager of its Paris branch. The

(1) [1923] 2 K. B. 682. (2) (1789) 3 T. R. 199, 249.

H. L. (E.) 1924 BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD v. GOUKASSOW. Viscount Cave.

plaintiffs' claim was resisted on various grounds of which two only are now material, that is to say, (1.) that in consequence of the decrees of the Soviet Government of Russia referred to in the previous case the plaintiff corporation had ceased to exist, and (2.) by reason of those decrees and of the nationalization of the Russian banks there was no one who could authorize the bringing of an action in the name of the plaintiff bank. Swift J. dismissed the action on the above grounds. On appeal to the Court of Appeal it was agreed that the evidence given in the previous case relating to the decrees should be treated as given in this case. The Court of Appeal, following their judgment in the previous case, affirmed the judgment of Swift J., and thereupon the present appeal was brought.

My Lords, except that there is in this case no order to wind up the appellant company and no question of estoppel, the case is substantially the same as that which has just been decided; and the absence of a winding-up order is compensated for by two orders of the Civil Tribunal of the Seine Department by which Mons. Jecquier was appointed manager of the Paris branch of the appellant bank and was confirmed in the powers which had been given to him by the head office of the bank. This being so, both the defences above referred to are disposed of by your Lordships' decision in the previous case and the appellants are entitled to succeed in this appeal.

I move your Lordships, that the orders of Swift J. and the Court of Appeal be set aside, and that judgment be entered for the appellants for the amount of their claim with costs here and below.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD WRENBURY. My Lords, I concur.

Order of the Court of Appeal reversed, and judgment entered for the appellants for the relief claimed. The respondent to pay the

costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 22, 1924.

Solicitors for the appellants: *Stephenson, Harwood & Tatham.*

Solicitors for the respondent: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

BARONY OF BEAUCHAMP.

H. L. 1924 *July* 29.

IN COMMITTEE FOR PRIVILEGES.*

Parliament—Peerage—Ancient Barony—Constitution of Parliament for Peerage Purposes—Sitting in Parliament pursuant to Writ of Summons—Evidence.

The claimant to an ancient barony which had long been in abeyance proved that an ancestor received a writ of summons in 1283 to the Parliament of Shrewsbury, the primary business of which was to deal with the traitor David of Wales. This assembly was admittedly not a properly constituted Parliament for peerage purposes owing to the absence of the clergy, but the claimant contended that, on the construction of a grant made by the King in 1277 to David and his brother Owen, David was thereby created a peer, that this Parliament was summoned for the trial of a peer by his brother peers, and that the fact that the claimant's ancestor had been summoned by name to this Parliament afforded a presumption that he was himself a peer.

The claimant further proved that another ancestor had been summoned in 1300 to the Parliament of Lincoln, at which a claim by Pope Boniface VIII. to rights of superiority over Scotland was considered, and that he sealed the Barons' letter of protest to the Pope.

The claimant further proved that this ancestor was summoned by a writ dated December 3, 20 Edw. 2 (1326), to attend the prorogation of a Parliament of Westminster on the morrow of the following Epiphany (January 7, 1327), and produced a Charter Roll, February 20, 1 Edw. 3

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* *Present:* EARL OF CLARENDON, VISCOUNT HUTCHINSON (EARL OF DONOUGHMORE) in the Chair, LORD HYLTON, LORD REDESDALE, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD ASKWITH.

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(1327), from which it appeared that he was a witness to an inspeximus and confirmation by the King of a charter granted by his father to a college of the University of Oxford, and that this confirmation was expressed to be "with the assent of the Prelates, Earls, Barons and Commonalty of our Kingdom being in our present Parliament assembled at Westminster":—

Held (1.), as to the so-called Parliament of Shrewsbury, that the claimant's contention that this assembly was summoned for the trial of a peer by his brother peers failed, there being no adequate proof that David was created a peer, and that, having regard to the anomalous nature of the assembly and to the absence of all proof that the claimant's ancestor took part in its proceedings, in fact, as a peer, the mere attendance of the latter in obedience to the writ was not sufficient to justify the inference that he was thereby created a peer; (2.), as to the so-called Parliament of Lincoln, that it was not so duly constituted as a Parliament that the composition, adoption, signature and sealing of the letter addressed to the Pope was a proceeding properly so called in Parliament, and that the service of the writ of summons upon the claimant's ancestor, plus his subsequent attendance, his participation in the adoption of the letter, and his sealing of it, did not afford sufficient evidence that he was then created or had theretofore become a peer of the realm; (3.), as to the Parliament of Westminster, that the King, in confirming the charter, was not carrying out a transaction, participation in which would have the same effect in proving a person to be entitled to a peerage as would a sitting as a peer in Parliament duly summoned to transact the business of the State.

Held, therefore, that the claim failed.

THE petitioner, Lt.-Col. Ulric Oliver Thynne, C.M.G., D.S.O., of Muntham Court, Worthing, prayed that His Majesty might be pleased to determine the abeyance now existing in the Barony of Beauchamp, and to direct a writ to be issued to summon him to Parliament by the name and style of Baron Beauchamp.

The petitioner claimed to be one of three co-heirs of John de Beauchamp of Hatch, Somerset, and of the said barony. Subject to the verification of his pedigree, which was postponed until the Committee had decided certain questions of constitutional law to which the case gave rise, the petitioner proved that his ancestor the said John de Beauchamp was summoned to the Parliament at Shrewsbury in 1283, and that his son, John de Beauchamp, the second, was repeatedly summoned to Parliament. In particular he proved that the second John de Beauchamp was summoned to the Parliament of Lincoln in 1300, and that he sealed a letter of the barons to

Pope Boniface VIII., which was composed in that Parliament; and further that the said ancestor was summoned in 1326 to the prorogation of a Parliament of Westminster, which sat in 1327, and that his name appeared as a witness to an inspection and confirmation of a charter "for the College of Scholars of the University of Oxford founded by Adam de Brome," which confirmation was expressed to be effected by King Edward III. "with the assent of the Prelates, Earls, Barons and Commonalty of our Kingdom being in our present Parliament assembled at Westminster."

The petition showed that the said barony fell into abeyance on the death of the fourth John de Beauchamp without issue in 1361 between his elder sister Cicely, widow of Sir Roger Seymour, and his nephew John de Meriet, whose issue subsequently became extinct.

1924. July 7, 8, 9. *Sir John Simon K.C.* (with him *Fox-Davies*) for the petitioner. The claimant will prove that his ancestor the first John de Beauchamp was summoned to the Parliament of Shrewsbury in 1283. The primary business of that Parliament, as appears by the terms of the writ, which is set out in the Appendix in the third volume of the Reports on the Dignity of a Peer, p. 48, was to deal with the traitor David of Wales, who had been the recipient of high favours from King Edward I., and indeed had been made a peer by him, and had then rebelled against him. This Parliament has been the subject of a good deal of examination by the Committee for Privileges, and it is now conceded that it was not a fully constituted Parliament for peerage purposes, because there was no summons to the clergy. That, however, is not surprising having regard to the business in hand, because on the rare occasions when this House sits as a criminal Court for the trial of a peer by peers the traditional form is that the spiritual members of the House protest and withdraw. That David was made a peer is shown by a grant made by the King in 1277 to David and his brother Owen. The first part of that document confers upon David and Owen a grant of certain lands in Wales in the event of the King being successful

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in his expedition against Llewelyn of Wales, another brother. That is a conditional grant. But the document then proceeds: "And we wish also and intend that the aforesaid David and Owen and their heirs should come to our Parliaments in England like other earls and barons, when necessary, and have from us for this purpose an express summons." That language is not conditional. It shows that David would be summoned to Parliament by a special mandate, which is an essential quality of a peer, and, being thus enrolled, he was a person who was entitled to a trial by his peers. That was a principle which was well known at the time, and, in fact, it was one of the provisions of Magna Charta. When therefore it is found that John de Beauchamp was one of the persons summoned by name to Parliament for the express purpose of trying the traitor David, that affords a strong presumption that this John de Beauchamp was in fact in enjoyment of a barony; otherwise why should he have been summoned? Consequently there is no room for saying that he was called to Shrewsbury in order that he might take the oath in Council and thereafter have the position of a noble. The suggestion is not that this was a Parliament a sitting in which would create a heritable dignity if it did not otherwise exist, but that, in view of the fact that the primary business of this Parliament was to deal with David, who was as a matter of fact a noble, the persons summoned to that Parliament were themselves nobles.

The claimant will prove further that the second John de Beauchamp was summoned to Parliament as a peer of the realm—i.e., by an individual summons—from 27 Edw. 1 until 9 Edw. 3. In September, 1298, he was summoned to attend at Carlisle cum equis et armis. That is not a good summons for peerage purposes, but in that summons he was described as a baron. In 1298–9 he was summoned to a Parliament in London. That was a perfectly good summons to Parliament, and in the enrolment of the writs of summons he was included in the list of barons. His description as a baron is not relied upon as proof of that fact, but it is an instructive circumstance to which it is legitimate to

refer as strengthening the claimant's case. So far no sitting has been proved. In 1300 this John de Beauchamp was summoned to the Parliament of Lincoln. At that time Edward I. had invaded Scotland and had beaten Wallace at the battle of Falkirk, and he claimed to be the feudal superior of Scotland. This claim was disputed by Pope Boniface VIII., who sent a papal bull to the Archbishop of Canterbury, denying the right of the King and claiming for himself rights of superiority over that country. The King repudiated the claim of the Pope, and resolved to bring the matter before his Barons' Council. Accordingly a Parliament was summoned to meet at Lincoln towards the end of January, 1300–1. It was at this Parliament that the barons discussed the claims of the Pope and wrote their famous letter of protest, a print of which will be found in the third volume of the Reports on the Dignity of a Peer, p. 125. This letter appears by its terms to have been composed as the result of actual parliamentary debate, and to show that the persons who took part in composing and executing it were present in Parliament. Among the peers who sealed this letter was John de Beauchamp. See for a facsimile of this letter and the seals Lord Howard de Walden's Some Feudal Peers and their Seals, pp. xviii., xix., xxi., xxxii. This fact, in conjunction with the independent proof of the issue of the writ, is relied on as proof of John de Beauchamp's presence in that Parliament. This question was considered by your Lordships in the Fourth Report on the Dignity of a Peer : see Reports on the Dignity of a Peer, vol. ii., p. 325. The Committee decided that the letter to the Pope could not be used as proving a sitting under a writ, unless there was independent proof of the issue of the writ. But the Committee went on to say that perhaps it could be used for that purpose where the issue of the writ could be proved aliunde. The reason for that decision was, no doubt, that the letter contained the signatures of certain persons who did not appear to have been summoned to Parliament. The point was argued in the *Fauconberg Peerage* case (1), and the

(1) Reported for the House of Lords in 1903.

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decision of the Committee appears to have been in the nature of a compromise. The Committee did not resolve what was the date of the origin of the barony, but reported that in the reign of Henry VI. the barony was vested in William Nevill in right of his wife Joan. But an examination of the pedigree in that case shows that the only reason which would cause Joan to be a baroness suo jure was that her ancestor was summoned to the Parliament of Lincoln and was a party to this letter to the Pope. In the *Hastings Peerage* case (1) this letter was tendered by counsel for the claimant for the same purpose, but, on objection being taken to it by the Attorney-General, it was provisionally withdrawn, and ultimately it did not become material.

In further proof that this John de Beauchamp sat in Parliament the claimant will produce a Charter Roll, February 20, 1327 (1 Edw. 3), from which it appears that John de Beauchamp, having been summoned to attend the prorogation of the Parliament at Westminster in the following Epiphany by writ dated December 3 (20 Edw. 2), was on February 20 following a witness to an inspeximus and confirmation of the charter, "For the College of Scholars of the University of Oxford founded by Adam de Brome" (being now Oriel College), which was expressed to be by the King "with the assent of the Prelates, Earls, Barons and Commonalty of our Kingdom, being in our present Parliament assembled at Westminster." That shows that this was a parliamentary Act, and that the claimant's ancestor was a witness to it. It is proved independently that he received a summons to attend this very Parliament: see Reports on the Dignity of a Peer, vol. iii., p. 369. Nothing turns on the fact that this was a summons to a prorogation of Parliament. Prorogation means nothing more than postponement. One form is that the Sovereign summons a Parliament for a particular date and then postpones its opening to a later day. That is a prorogation which frequently happens after a general election. Then the term is also used at the end and not at the beginning of a Session. Here it is used in the

(1) (1841) 8 Cl. & F. 144, 151–2.

former sense. The Parliament was originally summoned for December 15, 1326, but by the second summons the date is postponed till January 7, 1327. That is clearly a good summons to Parliament, and this confirmation was a proceeding in Parliament to which John de Beauchamp was a witness. The words which occur at the end of the confirmation, "per ipsum regem et consilium," give rise to no difficulty. In those days Parliament was not regarded as something different and absolutely distinct from the Council. It was really the Council reinforced and enlarged by the presence of all those other elements which make its deliberations representative: Pollard's Evolution of Parliament, pp. 98, 278. These words may quite possibly be due to a mistake of the clerk who made the entry or the explanation may be that they are merely a note of the authority to the Chancellor to record the grant. But, whatever the effect of the words, they do not take away from or alter the crucial fact that this document was a confirmation in Parliament with the assent of the three estates of the realm and that John de Beauchamp was shown to be present.

It is nothing to the point whether the confirmation could have been effected by the Sovereign alone; the point is that it was, in fact, effected in Parliament. On both the above grounds the claimant succeeds in showing that the second John de Beauchamp was summoned and attended as a peer in Parliament.

Sir Patrick Hastings A.-G. and *Geoffrey Ellis* for the Crown. First, as to the Parliament of 1283, assuming (which is not admitted) that everything which Sir John Simon seeks to deduce from the document of 1277 is well founded, it establishes nothing. Two things must be established. One is a summons to a Parliament; the other is attendance at a Parliament. As soon as it is admitted that this was not a duly constituted Parliament, any discussion as to what happened at it is futile. The suggestion is that, as David was a peer, it is to be presumed that John de Beauchamp, the first, was a peer, otherwise he would not have been summoned to this assembly. But if that is all that is made

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out, it really disposes of the necessity of proving either a writ or a sitting in Parliament. This would be an enormous departure from anything that this Committee has ever decided or from anything which has been even argued before it. The creation of a dignity must be proved by matter of record: Cruise on Dignities, pp. 259, 262. Further, as to the grant of 1277, it is submitted it is all conditional on the success of the expedition into Wales. Moreover, the grant is to David and Owen jointly, and there is no limitation of any kind. As far as is known, neither of the brothers was ever regarded or was summoned as a peer or did anything at all which could be properly described as the act of a peer. There can therefore be no question of any trial of a peer by his peers. Then as to the Barons' letter to the Pope; that has never yet been accepted as evidence of a sitting by a signatory—and for a very good reason. It appears from a series of documents known as the Wardrobe Accounts that money was paid for two horses for messengers sent by the King to divers magnates in England and Wales to obtain their signatures to this letter. That clearly establishes that many of those who affixed their seals to this document were not present at the Parliament, and there is nothing to show how the seal of John de Beauchamp got upon this document. Moreover, the letter bears date February 12, and it appears that the knights of the shire were allowed their expenses and suffered to go home on January 30: Stubbs's Constitutional History, 1st ed., vol. ii., p. 151. As to the inspeximus and confirmation of 1327 there is no record of that in the Parliamentary Roll. Nor was there any need to obtain the consent of Parliament to the confirmation of a charter to a college in Oxford. The mere fact that John de Beauchamp's name appears as a witness to this document cannot be accepted as sufficient evidence that he attended that Parliament. Apparently the practice in those days was that whenever a document of this sort which bore the King's signature came into existence, the clerks in Chancery put down the names of a certain number of persons as witnesses. There is no evidence that those persons ever

saw the document at all; their seals were not attached, neither signatures. The names seem to have been collected from persons who were of a certain degree of importance either in the Kingdom or in the King's household; and it is not an extravagant suggestion that they were taken from the writs. Can a sitting be sufficiently proved by the fact that a man's name appears upon a document which he could not read and could not understand, never acknowledged and probably never saw?

Sir John Simon K.C. replied.

The CHAIRMAN announced that their Lordships' decision would be communicated at a convenient date.

1924. July 29. EARL OF DONOUGHMORE (Chairman). Their Lordships have agreed upon their judgment in this case and Lord Atkinson has been good enough to say that he will now read it.

LORD ATKINSON. My Lords, in this case no patent was given in evidence, no statute referred to conferring upon the ancestors through whom the petitioner claims, or any of them, a barony or other peerage descendible to his heirs general. Writs of summons directed to some of these ancestors to attend Parliament were proved, but no proof was adduced to show that any of them—at least at the crucial periods—sat in the House of Peers as a member of it in the sense conveyed by that expression.

It was contended, however, that it was by certain documents established that these ancestors took part in certain transactions alleged to have taken place in Parliament, their participation in which as effectually proved that they were entitled to a peerage descendible to their heirs general as if they had actually sat in Parliament.

Before dealing with these transactions, their significance and effect, it would be well to refer to a few of the authorities which lay down the general principle upon which the fact that a person who has sat in the House of Peers, taking part presumably in its deliberations, is held to lead legitimately

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to the conclusion that this person is himself a Peer of the Realm, and then to consider how far, if at all, that principle is applicable effectively to the transactions in which it has been shown those ancestors of the petitioner through whom he claims participated. It will suffice to refer to four or five of these cases—namely, the *Vaux Peerage* case (1); the *Braye Peerage* case (2); the *Hastings Peerage* case (3); and the *Mowbray and Segrave* case in 1876. In the first of these cases it was proved that the ancestor of the petitioner—one Thomas Lord Vaux—through whom he claimed, sat in 25 Hen. 8 in the House of Peers, and that three years later a writ of summons was served upon him under which he actually sat in that House, as did also his two great-grandsons. The main point of controversy was whether at this period the title was descendible as it is at common law—namely, to heirs general, and therefore descendible to females—or was limited to his heirs male.

Two passages from the judgment of the Lord Chancellor (Lord Cottenham) are instructive. In dealing with the descent of the peerage he said (4): "It is admitted on all hands—and that is unquestionably the rule—that, if the creation appears to have been by writ, and that writ is in the ordinary terms, the summons by writ, accompanied by a sitting in this House, would create a title descendible to females. . . . . My Lords, it is said, that in the absence of all proof either way, but from merely finding a peer sitting in the House, there is no more reason for presuming a sitting by writ than there is for presuming a sitting by patent; that there being an absence of all proof of the title under which Thomas Lord Vaux sat in the 25th of Henry 8, your Lordships are not to come to a conclusion, presuming that sitting to be by writ, which would be one species of the creation of an estate, in preference to presuming that the title originated in a patent, which would give another species of estate, and which would exclude the present claimants, according to

(1) (1837) 5 Cl. & F. 526.
(2) (1839) 6 Cl. & F. 757.
(3) 8 Cl. & F. 144.
(4) 5 Cl. & F. 613.

the ordinary mode in which titles are granted by patent. It does not appear to me that the two presumptions stand at all on the same footing. In the first place, all peerages must have their origin in a writ; whether a peer be created by patent, or by a summons from the Sovereign and acting upon that summons by taking his seat in this House, the writ must be the means of his introduction here. If there be a patent, the effect of the writ is limited by the terms of the patent, but still a writ there must be; therefore, although it is a presumption, as everything is a presumption where you have not the thing proved; yet it is an irresistible presumption that there must have been a writ, and that Thomas Lord Vaux, before he took his seat in this House, must have had a writ. . . . . It is, therefore, no violent presumption in point of history, that a peer, found sitting in this House in the 25th of Henry 8, had obtained his title to sit here by a writ unaccompanied by a patent. But, my Lords, on a question of presumption, the law will presume all that is necessary to account for that which appears to have been done, and it will irresistibly presume that which must necessarily have accompanied the act proved; so that, when we find a peer sitting, we conclude that there must have been a writ to bring him to this House; though the writ itself be not produced, yet that there must have been a writ, is a matter on which your Lordships cannot entertain any doubt."

In the *Braye Peerage* case (1) the *Vaux* case (2) was approved of and followed. The decision of the Committee in the latter was, as stated in the headnote, to have been that on the consideration of an ancient barony which has been long in abeyance, if the claimant proves that his ancestor sat as a peer of Parliament and no patent or charter creating it can be discovered, it is now the established rule to hold that the barony was created by writ of summons and sitting, although the original writ or enrolment of it is not produced. Lord Cottenham referred to and approved of the resolution adopted in the *Vaux Peerage* case (2), and said that "where the evidence satisfactorily made out such a sitting by writ, it

(1) 6 Cl. & F. 757, 780. (2) 5 Cl. & F. 526.

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should be presumed that there was evidence of a title to the heirs-general of the person so summoned, and consequently that such a peerage might descend through females."

The result of the authorities on this point is stated succinctly and clearly by Lord Parker of Waddington in the *St. John Peerage Claim.* (1) He said: "The principles on which this Committee acts when it has to consider whether the existence of an alleged barony has been established admit of no doubt. Leaving out of account the case of Letters Patent from the Crown, it is well settled that a barony can only be established by proof of a Royal writ summoning some ancestor of the claimant to attend a Parliament followed by an actual sitting of such ancestor in the Parliament to which he was summoned. It is also well settled that while proof of such a writ raises no presumption that the person summoned actually sat, proof, on the other hand, that a person sat in a Parliament will raise a presumption that he sat by virtue of a Royal writ summoning him to it. But the Parliament to which the claimant's ancestor was summoned and in which he sat must have been a Parliament in the more modern sense of the word; that is to say, it must have conformed in its more essential characteristics to what is called the Model Parliament of 1295." An entry in the Parliament Roll (Exchequer Series) for the year 1289–1290 was proved in this case, showing that the claimant's ancestor John de Saint John sat in a Parliament held in the year 1290. Writs summoning him to the Parliament held at Shrewsbury in 1283 and to the Parliament of 1299, and numerous other writs were further proved summoning his son and heir to various Parliaments in the reigns of Edward I. and Edward II., but the only proof given of a sitting in Parliament by any of his ancestors was a sitting by John de St. John in what purported to be a Parliament in the year 1290. It was held, however, by the Committee that neither of these were true Parliaments —inasmuch as the Commons were not represented in them— and for this reason, amongst others, the claimant was held not to have established his claim.

(1) [1915] A. C. 282, 305.

Lord Parker (1), further says: "There appears to be good reason for each of the principles to which I have referred. The power to create an hereditary dignity is part of the prerogative of the Crown, and from this arises the necessity of a Royal writ. Such a writ, till acted upon, can be superseded, and therefore proof of a sitting in Parliament pursuant to it is also necessary. It must be remembered too in this connection that the House of Lords has always exercised the right of scrutinizing the title on which a claim to a peerage is based and seeing that all formalities and precedents have been duly observed. Finally there is good reason to suppose that Edward I., the founder of Parliament" (i.e., the Model Parliament of 1295) "in the modern sense of the word, did not consider himself bound to summon as peers of Parliament all those who had theretofore attended his councils under the name of barones proceres or magnates, so that the dignity of a peer of Parliament must depend on the nature of the assembly to which the claimant of such a dignity had been summoned and in which he had taken part." A good example of the ineffectual nature of a writ of summons to a Parliament not followed by a sitting in that Parliament by the person to whom the summons is addressed is furnished by the *Mowbray and Segrave* case reported in 1876. In that case William de Mowbray, the ancestor from whom the claimant traced his descent, received a writ of summons to attend a Parliament in the 22nd of Edw. 1. The eldest son of this William de Mowbray, Nigel by name, died without issue. His second son, Roger, who had a son also called Roger after his father, received writs of summons to attend Parliament up to the 25th of Edw. 1. John de Mowbray, the son of this last named person, was frequently summoned to Parliament, and actually sat in the Parliament which assembled in the 12th of Edw. 2. This was the first sitting in the House of Peers by one of the claimant's ancestors. It was not contended that the service of a writ of summons not followed by a sitting in Parliament in pursuance of it could create a peerage; but

(1) [1915] A. C. 306.

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the struggle being to establish the antiquity of the peerage, it was contended that the service of the earlier writs of summons amounted to a recognition of the title of the person served to a peerage existing at the date of the service. No countenance was given to this contention by the Committee. The Committee held that these writs neither created a peerage nor amounted to the recognition of an already existing peerage in the person served. The de Mowbray and Segrave peerages had become united. The same point was raised in the *Segrave* case as had been already raised in the *de Mowbray* case as to the effect of the service of a summons amounting to a recognition of a peerage existing in the person served. It was, however, in addition sought to put back the date of the creation of the latter peerage to the 49th of Hen. 3 by the production of two documents referred to at p. 57 of the report. The first and most important of these two was a record of an agreement dated December 7, 1261, made by King Henry III. with Nicholas de Segrave and certain magnates and barons in reference to the carrying into effect of the Provisions of Oxford. The Board had no doubt been concerned in obtaining from the King certain privileges and promises which were embodied in the so-called Provisions of Oxford. The name of Nicholas de Segrave was mentioned amongst those of the magnates of the realm, some of whom were most probably peers, but this document, notwithstanding the service of the writs, was held not to be sufficient to show that he was a peer or ever sat in Parliament.

Assuming for the moment that the pedigree given in evidence in the present case has been duly proved to be accurate, the case of the petitioner resolves itself into this. Several of his ancestors have from time to time been summoned to assemblies purporting to be Parliaments, but there is no adequate proof that any of them sat as a peer in one of those assemblies, or took part in its deliberations ; but though this is so, it is contended on the petitioner's behalf that on three several occasions his ancestors participated in certain proceedings which took place in the Parliaments to which they had been summoned, which proceedings, taken in

connection with the summonses served, were, when rightly considered, equivalent in their effect to a sitting in the House of Peers.

The earliest ancestor of the petitioner to which these remarks apply was John Beauchamp of Hache, who was summoned in the 11th of Edw. 1. (1283) to attend an alleged Parliament. The first question arising upon this matter is whether the assembly to which he was so summoned was a Parliament at all in the proper sense of that term. Its composition and function were considered at length and much discussed in the *Fauconberg Peerage* case. According to the account given by Bishop Stubbs in his Constitutional History (1877 ed.), vol. ii., p. 116, David, the brother of Llewelyn, was captured on June 22, and the King was determined that he should be tried in the presence of a full representation of the laity. The case put forward on behalf of the present claimant is that David was a Peer of the Realm, and that John Beauchamp of Hache was summoned as a Peer of the Realm jointly with some other Peers of the Realm, to try David under the well-known provision of Magna Charta because he was himself a peer. Well, the first difficulty about that contention is that there is no adequate proof at all of the fact that David was a peer. On the contrary, the very next paragraph at p. 116 of Bishop Stubbs's work contains a statement going strongly to show that he was not a peer. It runs thus: "This unhappy man" (i.e., David), "whose conduct had been one of the causes of the war and of the destruction of the Welsh power, was a sworn liegeman of Edward, from whom he had received a knighthood, and against whom, in spite of kindness and patience, he had conspired. He had been delivered up by the Welsh themselves, and the king determined that he should be tried in the presence of a full representation of the laity."

As a proof of David's ingratitude to the King the fact is mentioned that the King had given him a knighthood. It is scarcely conceivable, if he had received a peerage, either from this King Edward or one of his predecessors, that, as a still greater proof of David's ingratitude, the gift

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would not have been mentioned, though the gift of the knighthood is. Well, the bishop most happily styled the assembly which the King thus brought together, and which the bishop says he intended to use as a Parliament, as an anomalous assembly. The writs for this assembly were issued on June 28. The sheriff of each county was to return two elected knights for the county, and the governing bodies of twenty cities and boroughs were commanded to return two representatives each. Eleven earls, ninety barons and nineteen other men of note, judges, councillors and constables of castles were summoned by special writs. The day of meeting was fixed for September 30. No bishops or abbots were summoned, as the business was the trial for a capital offence. At Shrewsbury accordingly David was tried, condemned and executed. His judges were chosen from the justices of the Curia Regis under John Vaux. The assembled barons, he says, watched the trial as his peers, and the Commons must have been supposed to have given moral weight to the proceedings. That is the bishop's notion of what the nature of the proceedings was. Whatever may have been their true character, they did most certainly not amount to a trial of one Peer of the Realm by other Peers of the Realm.

The learned bishop at p. 453 of his book entitled Select Charters and other illustrations of English Constitutional History (1st. ed.), referring to this assembly, says it "differs from an ordinary parliament in two important particulars: (1.) it did not contain clergy or even bishops; and (2.) the representatives of the towns were summoned by separate writs, and not through the sheriffs. It is, however, called the Parliament of Shrewsbury. . . . . Notwithstanding the language of the writs, it would seem from the words of the historians that David was tried by the Baronage only; and the Statute of Acton Burnell" (i.e., the Statute de Mercatoribus), "although called by that name, was really only an ordinance of the king and his council. It is therefore only in the loosest meaning that the name of parliament is given to the assembly."

The object of calling this assembly together is stated in the heading of the writ to have been "de tractatu habendo de David filio Griffini." "De tractatu habendo" means for the consideration of matters relating to David. The words lower down in the writ are "ordinare quid de David fieri debeat memorato." Having regard to the nature of this assembly and the absence of all proof that the petitioner's ancestor took part in its proceedings, in fact, as a peer, their Lordships think that the mere attendance in obedience to the writ served upon the petitioner's ancestor is not sufficient to enable them to infer that it was intended by the Sovereign to thereby create him a peer, or that he was thereby created a peer.

In the year 1300 a writ was directed to John de Beauchamp (28 of Edw. 1) summoning him to a Parliament to be held at Lincoln. The question whether he attended this Parliament raises the question raised in the Fauconberg Peerage case—namely, whether a letter sent by the Barons of England to Pope Boniface VIII. amounts, under the circumstances in which it was sent, to a proceeding in the Parliament of Lincoln. After the battle of Falkirk had been fought in the war between Scotland and England, Scotland was for the time being in a condition of subjection to England. The Scots appealed to this Pope in the fifth year of his pontificate, i.e., 1299, and he issued a bull directed to King Edward, in which, after contesting the claim of the King to the crown of Scotland, he concluded by asserting that he himself, the Pope, was the liege lord of Scotland. The transmission of this bull to England was greatly delayed. It was held in reserve for some time by the Archbishop of Canterbury, to whom it was directed. Ultimately he presented it to the King. This caused great commotion. The King at once summoned a Parliament to meet at Lincoln. The writs of summons did not, as did the writs issued in the case of Shrewsbury, state what was the subject to be considered, but having regard to the nature of the proceedings which took place at the meeting, there can be little doubt that what was to be considered was the claim put forward by the Pope

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in his bull. The writ runs : " Vobis mandamus in fide quoad sitis ad nos ad Parliamentum Nostrum Apud Lincoln." Similar writs were sent to a number of ecclesiastics such as the Dean of Chichester, the Dean of St. Paul's, the respective Chancellors of the Universities of Oxford and Cambridge, and these latter were directed to send to the said Parliament, " duos vel tres de discretioribus magis in jure scripto expertis." Then there are writs to the abbots, priors and convents named. In none of these writs was mention made of the matter to be considered, and though the words " veniendo ad Parliamentum " are used, the word "Parliament" is often applied to assemblies which are not true Parliaments at all: see the *St. John Peerage Claim.* (1)

In the case of Lincoln, however, the words are : " Parliamento apud Lincolni generali," which might suggest that the Parliament was held for the whole kingdom. The letter drawn up addressed to the Pope embodies a strong assertion of the rights of the King of England and a repudiation of the claims of the Pope. At the end of the letter are written the words following : " In Cujus rei testimonium sigilla nostra tam pro nobis quam pro tota communitate prædicti regni Angliæ presentibus sunt appensa."

This signifies that the signatories were claiming to speak for the whole community of England.

One of the seals attached to the letter is undoubtedly that of John de Beauchamp. The letter is said to be given at Lincoln, February 12, 1300. The assembly was summoned for the octave of St. Hilary, which would be about January 19, twenty-four days before the date of the letter. It appears from Stubbs's Constitutional History (1877 ed.), vol. ii., p. 151, that the knights of the shire had been sent home on January 30, consequently on that date the full Parliament would come to an end. The evidence produced by the Crown from the wardrobe accounts detailing the sums paid to messengers for procuring the sealing of the documents by individual barons also clearly showed that many of the

(1) [1915] A. C. 282.

seals were attached some considerable time after Parliament had separated. It cannot be assumed that those persons who attached their seals to this letter thereby vouched for the truth and accuracy of every statement it contained, but their Lordships think it may be taken for granted that by attaching their seals to it they did vouch for the truth and accuracy of statements contained in it relating to their own personal actions. Some of the main difficulties in treating this assembly at Lincoln as a true Parliament, though referred to by the King as a Parliament, are: first, that it assembled five years after this same King Edward I. had in his Model Parliament drawn up the lines upon which such assembles should in future be shaped, lines closely resembling those on which modern Parliaments are constituted; second, that many persons attended the assembly who were neither Peers of the Realm nor Lords Spiritual, nor knights of the shire, nor representatives of municipalities. For instance, the learned men selected by the Chancellors of Oxford and Cambridge respectively. Thirdly, that many persons who were summoned to it, other than the Lords Spiritual, did not seal this letter to the Pope at all, and fourthly—and more significant than all the others—the letter was sealed by many persons who were not summoned to attend at Lincoln. The list of those who were summoned and attended this assembly is best given in the list appended to the Reports on the Dignity of a Peer, vol. iii., p. 127. This list has been analysed, and the result is given at p. 173 of the report in the *Fauconberg Peerage* case. It appears from the analysis that nine earls and eighty barons were summoned by writ to attend at Lincoln, but that seven earls and ninety-six barons or persons described as Domini are recorded to have been parties to the letter; that in the result thirty-one persons are parties to the letter to the Pope who are not recorded as having been summoned to, or to be authorized to attend, this so-called Parliament of Lincoln.

It is possibly not unnatural that this should be so, since the King was obviously anxious to convince the Pope that he had all classes of the community behind him in resenting

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the latter's claim to jurisdiction and authority over Scotland. This letter was tendered in evidence in the *Hastings Peerage* case (1) by Sir Harris Nicolas, who appeared for the petitioner. The Attorney-General (Sir John Campbell) objected to its reception on the ground, as appears from the report of the case, that it did not appear that it was an act done in Parliament. Sir Harris Nicolas pressed it on the authority of the statement at the conclusion of the Fourth Report on the Dignity of a Peer of the Realm: Reports on the Dignity of a Peer, vol. ii., p. 341. The Attorney-General suggested it should be withdrawn for the present, to be tendered at a future stage of the proceedings in case its production should become material. This was done. Its production never did become material, because in that case a sitting in the reign of Edward I. was proved by other evidence. In this report of the case it is stated that the counsel were informed (i.e., by the Committee) that it did not appear from this (i.e., the drawing up, signing and sealing of the letter) that the individual could only have done so as a peer. That appears to have been suggested by the Committee, of which Lord Cottenham was Chairman, as a test. It does not appear to be a bad test, and may possibly be the real ground upon which the sitting of a person in the House of Peers as a peer is treated as proof that he is a peer. For, after all, if a man sits in the House of Lords as a peer, it is more rational to infer that he is legally entitled to do so, than to infer that his sitting is a usurpation of a position he is not entitled to fill, acquiesced in submissively by the House of Peers. The more natural conclusion to draw from his presence is that he is what he pretends to be, inasmuch as he could only legally do that act if he was a peer. The passage referred to in the Dignity of a Peer really only amounts to this: that perhaps the letter to the Pope might be regarded as evidence of a sitting if a previous summons to the person signing it could have been proved, but that where a previous summons could not be proved the letter would not be so regarded. Lord Halsbury said he thought the comment on it might be as to

(1) 8 Cl. & F. 144, 151–2.

the weight of it, as to what it proved, but that he thought it was clearly admissible as evidence.

On the whole case touching this so-called Parliament at Lincoln, their Lordships are of opinion that it was not so duly and legally constituted as a Parliament that the composition, adoption, signature and sealing of the letter addressed to the Pope was a proceeding, properly so called, in Parliament, and that the service upon John Beauchamp de Somerset of a writ of summons to attend it, plus his subsequent attendance, his participation in the adoption of the letter and his sealing of it, did not afford sufficient evidence that he was then created, or had theretofore become, a Peer of the Realm. So much for the transactions, the proceedings at Shrewsbury and the proceedings at Lincoln, upon which the petitioner rests his petition.

The third and last proceeding, which took place at Westminster, relates to an inspeximus, recorded in the Charter Roll dated February 20, 1 of Edw. 3. (1327). Turning to it, one finds that John de Beauchamp was by writ, dated December 3 previous, summoned to attend a meeting for the prorogation of Parliament. The writ is to be found in the Appendix to the Dignity of a Peer of the Realm, Part III. It is stated in the body of the writ that the person summoned is summoned to a prorogation of Parliament. There is a side-note describing the writ as for the prorogation of Parliament, an asterisk is attached, and at the foot of the writ, with a corresponding asterisk, there is a statement to the effect that no writs appear for this Parliament. But the prorogation of the Parliament is the act of the Crown not of the Parliament, or of either or both of its Houses.

Formerly, Parliament was prorogued by the writ of the Sovereign. But in no sense is it the act of the Parliament. To arrive at a right conclusion as to what this inspeximus really was, and to judge of its character and effect, it is necessary to examine its provisions in some detail. It is addressed to the Archbishop, etc., Greeting. It commences with a recital that We (i.e., the King) have inspected a charter which the late King, his father, made in the following words :

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"Edward, etc., to the Archbishop, etc., Greeting," and goes on to aver in substance that after considering with attention the abundance of fruit which the University of Oxford had reared for the Church of God out of their sacred learning, and had theretofore bred and will hereafter breed for the good of the kingdom, and believing she will continue to do these good works, the King is determined to found a college at Oxford for the study in the university of the knowledge and the dialectic arts therein described and enumerated, which he thereby does for all time to come and appoints that this college shall be governed by Clerk Adam de Brome. The King then proceeds to grant for the first foundation of the college and the maintenance of its scholars certain lands and houses in Oxford, and the advowson of certain churches named, and gives it a licence that they may hold and use the church of St. Mary, of which he had already given the advowson, in order that the college might increase in the number of its scholars. It is obvious that prima facie the corporate action of either House of Parliament would not be necessary to validate any of the grants made by the King by this order. No evidence was given to show how the King had acquired the property he purported to grant. There are numerous instances well established where the Crown by its prerogative right granted away to individuals the property forfeited by the conviction for treason of its former owners, without the consent or approval of Parliament or either of its Houses. The objects the King desired to effect by this deed would be the result of his own grace and bounty voluntarily exercised, and not the result, as far as appears, of any action of either House of Parliament or of both Houses combined. Lower down on the same page of the inspeximus one comes upon the words: "these being the witnesses," and then follow the names of the Earl of Norfolk, Hugh le Despencer, Lord of Glamorgan, William de Ros of Hamelak, Robert de Nontalt, Thomas Bardolf, Robert de Morle and Thomas le Blount, Steward of the King's Household, and then the words "given under our hands (i.e., the King's hands) at Norwich, 21st day of January, in the ninth year of our reign." The

document then proceeds thus: "Now we (i.e., the King) considering that the premises were piously ordained for the honour of God and of Holy Church and for the increase of the worship of God do accept and approve the foundation gift and grants aforesaid in all and singular their clauses and do grant and confirm the same for us and our heirs." Then follow the words to the presence of which much importance was attached in argument on behalf of the claimant. They are "*with the assent of the Prelates, Earls, Barons and Commonalty of our Kingdom* being in our present Parliament *assembled at Westminster*, to the aforenamed Provost and Scholars of the said college and their successors as this Charter aforesaid reasonably sets forth." There are then added the words "These being witnesses: W. Archbishop of Canterbury, J. Bishop of Ely, A. Bishop of Hereford, H. Bishop of Lincoln, W. Bishop of Norwich, J. Bishop of Winchester, Thomas Earl of Norfolk, Edmund Earl of Kent, Henry Earl of Lancaster, Thomas Wake, *John de Beauchamp of Somerset* and John de Ros Steward of our Household and others. Given under our hand at Westminster on the 20th day of February by the King himself and Council."

As might have been expected, no reference to this transaction, though like many of its kind entered on the Charter Roll, is to be found in the Rolls of Parliament. According to May's Parliamentary Practice, and the notes attached, the proceedings in Parliament were recorded in the Rolls of Parliament from 1278–1503—i.e., from 6th of Edw. 1 to 19th of Hen. 8. The Lords' Journals commence in 1509 (1 Hen. 8), and the reason is obvious why neither Parliament nor one of its Houses took in its corporate capacity any action whatever in the transaction purporting to have been effected by this deed. It may well be that the statement "with the assent of the Prelates, Earls, Barons and the Commonalty of our Kingdom in Parliament assembled" was introduced with a view, because of the recent controversy with the Pope, to show that in making provision for the teaching of learning and religion the King had the community behind him, but it appears to their Lordships to be clear that

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the King, in carrying out further the project contemplated by his father, was not starting, setting on foot, or carrying out a transaction, participation in which would have the same effect in proving a person to be entitled to a peerage as would his sitting as a peer in Parliament duly summoned to transact the business of the State.

The words of Lord Cottenham, referred to by Lord Davey in the *Fauconberg Peerage* case, are not inapplicable to this matter: "It does not appear that this (i.e., the witnessing of this document on this occasion) or anything done in connection with it was an act which the individual could only have done as a peer."

Their Lordships are therefore of opinion that the petitioner has failed to establish his case and that the Committee should so report to the House.

I beg to suggest for your Lordships' consideration the following resolution: That in the opinion of the Committee the evidence produced by the petitioner, Colonel Ulric Oliver Thynne, is insufficient to prove that any of his ancestors ever sat in Parliament as Baron Beauchamp.

This resolution was agreed to by the Committee and communicated to the House.

The report made from the Committee for Privileges that the evidence produced by the petitioner, Colonel Ulric Oliver Thynne, is insufficient to prove that any of his ancestors ever sat in Parliament as Baron Beauchamp read and agreed to, and resolved and adjudged accordingly.

Lords' Journals, July 31, 1924.

Agents for the petitioner: *Walters & Co.*

Agent for the Crown: *Henry Cooke, for the Treasury Solicitor.*

[PRIVY COUNCIL.]

TORONTO CITY CORPORATION . . APPELLANTS ; J. C.*

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TORONTO RAILWAY CORPORATION . RESPONDENTS. Oct. 24.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Tramways—Purchase by City—Award—Effect of special Act—Assets necessary for Operation of Railway—Basis of Valuation—Cost of Reproduction—Time at which Prices to be taken—Jurisdiction to determine what Assets necessary—Interest.

By contract and under a special Act of Ontario the appellant city corporation had the right, which they exercised, to take over the respondent company's street railways in Toronto at a price to be determined by arbitration. The Act provided by s. 4, sub-s. 3, that the arbitrators were "to consider only the actual value of the actual and tangible property . . . . connected with and necessary to the operation of the railways"; by s. 4, sub-s. 4, they were to "consider and award only the value of the several particulars to the city at the time of the arbitration, having regard to the requirements of a railway of the best kind and system then in operation and applicable to the said city."

The arbitrators based their reasoned award as to the value of the railway tracks, rolling-stock, and buildings (including plant and machinery therein) primarily upon the cost of reproduction less depreciation. Both parties moved to remit the award on various grounds. The city contended that, having regard to s. 4, sub-s. 4, of the Act, the arbitrators should have determined first whether a reasonable person would have reproduced the particular assets as part of a railway system in Toronto at the date of the arbitration, and that if not they should have been valued at what they would have fetched, or if no sale were possible then upon a "scrap" basis:—

Held, (1.) that the arbitrators had rightly taken the cost of reproduction less depreciation as a guide in making their award; and that as they had also taken into account obsolescence, comparative utility, and other relevant considerations, the above contention by the city failed.

(2.) That the cost of reproduction had rightly been based upon prices generally current at the date of the arbitration, even if the hypothetical work of reproduction would have taken three years to carry out.

(3.) That the arbitrators had jurisdiction incidentally to determine

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* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW, LORD CARSON, and LORD BLANESBURGH.

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which assets were necessary for the operation of the railway, and therefore assets whose value was to be included in their award.

(4.) That an amount which the company had contributed towards the erection of a bridge by which their railway tracks were carried over those of another company could properly be included in the award, though not a tangible asset, since that part of the track could be regarded as increased in value to that extent.

(5.) That although the railway company was entitled to interest from the time when the city had obtained possession of the railway, that interest could not be added to the award, as it did not form part of the value of the assets.

Judgment of the Appellate Division varied.

CONSOLIDATED APPEAL and CROSS-APPEAL (No. 143 of 1923) from an order (September 24, 1923) of the Supreme Court of Ontario, Appellate Division, varying an order of Logie J. upon a motion by the Toronto City Corporation to set aside or remit an award of arbitration dated January 30, 1923, and a motion by the Toronto Railway Company to remit the said award or to increase it in amount.

The relevant facts, and the effect of the judgments in Canada, appear from the judgment of the Judicial Committee.

1924. June 23, 24, 26. *Tilley K.C.*, *Geary K.C.*, *A. C. McMasters K.C.* and *C. P. H. Carson* for the City Corporation.

Sir John Simon K.C., *Rowell K.C.*, *Hon. Geoffrey Lawrence* and *F. McCarthy* for the Railway Company.

The arguments sufficiently appear from the judgment. In addition to cases referred to therein reference was made to the following: (as to the principle of valuation) *Oldham, Ashton and Hyde Electric Tramway Co.* v. *Ashton Corporation* (1); *In re Peterborough City and Peterborough Electric Light and Power Co.* (2); (as to the jurisdiction of the arbitrator to determine which assets were "necessary") *North Metropolitan Tramways Co.* v. *Leyton Urban Council* (3); *Reg.* v. *Commissioners of Income Tax* (4); *Rex* v. *Bradford* (5); (as to inclusion of interest) *Rhys* v. *Dare Valley Ry. Co.* (6); *In re Leak and City of Toronto* (7); *In re Davies and James*

(1) [1921] 1 K. B. 269.
(2) (1916) 52 Ont. L. R. 9.
(3) (1908) 98 L. T. 792.
(4) (1888) 21 Q. B. D. 313, 319.
(5) [1908] 1 K. B. 365, 371.
(6) (1874) L. R. 19 Eq. 93.
(7) (1899) 26 Ont. A. R. 351.

Bay Ry. Co. (1); *In re Ketcheson and Canadian Northern Ontario Ry. Co.* (2); *Toronto Ry. Co.* v. *Toronto Corporation* (3); Ontario Interest Act (R. S. Ont., 1914, c. 56), s. 14; (as to time at which prices to be taken) *In re London County Council and London Street Tramways Co.* (4); (as to jurisdiction to set aside or remit the award) *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning Co.* (5); Ontario Arbitration Act (R. S. Ont., 1914, c. 65), Sch. I. (*a*).

Oct. 24. The judgment of their Lordships was delivered by

VISCOUNT CAVE. These appeals are brought, the first by the Corporation of the City of Toronto and the second by the Toronto Railway Company, against an order of the Appellate Division of the Supreme Court of Ontario dated September 24, 1923. By that order the Appellate Division on an appeal from an order of Logie J. partly allowed and partly refused a motion by the Corporation to set aside an award made by arbitrators in relation to the taking over by the Corporation from the railway company of certain street railways in Toronto, and also dismissed a motion by the railway company to set aside the same award. Against these decisions both the parties appeal on different grounds.

In the year 1891 the Corporation, having agreed to take over from the Toronto Street Railway Company (an old company which has now disappeared) the street railways of that company in Toronto and the real and personal property connected therewith, invited tenders for the purchase of an exclusive right to operate surface street railways in Toronto (except in certain parts of the city) for a period of twenty years, which was to be extended to thirty years in the event of legislation being obtained to enable that to be done. Under the conditions of sale upon which the tenders were to be made the person whose tender was accepted (therein called "the purchaser") was to take over all the property to be acquired by the city from the Toronto Street Railway Company at the

(1) (1910) 20 Ont. L. R. 534.
(2) (1913) 29 Ont. L. R. 339.
(3) [1906] A. C. 117, 120.
(4) [1894] 2 Q. B. 189, 209.
(5) [1923] A. C. 480.

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amount of the award under which the city was to acquire that property.

There were also other conditions of sale, including the following: "7. At the termination of this contract the city may (in the event of the Council so determining) take over all the real and personal property necessary to be used in connection with the working of the said railways, at a value to be determined by one or more arbitrators (not exceeding three) to be appointed as provided in the Municipal Act and Acts respecting arbitrations and references, and to have all the powers of arbitrators appointed under said Acts, and each party shall bear one-half of the cost of the necessary arbitration at conclusion of term of lease, but the city shall only pay for the land conveyed by them to the purchaser, what it is worth, without reference to its value for the purpose of operating a street railway or railways."

The successful tender was that of Messrs. Kiely, McKenzie and Everett, and by an indenture dated September 1, 1891, the Corporation assigned to them and to Mr. C. C. Woodworth all the railways and property acquired by the Corporation from the Toronto Street Railway Company, and granted to them the exclusive right for a period of twenty years from that date, and for the extended period of ten years in the event of the needed legislation being obtained "and no longer," to operate surface street railways in the city of Toronto with the exceptions therein mentioned, the above conditions of sale being incorporated in and made part of the grant.

By a statute of the Legislature of Ontario passed on April 14, 1892 (55 Vict. c. 99), the agreement between the Corporation and the four persons above named, with the conditions of sale above referred to, were declared to be valid and binding upon all parties for the full period of thirty years from September 1, 1891, and no longer, but subject to the provisions of the Act. By the same statute the respondent company, the Toronto Railway Company (therein called "the Company"), was incorporated and was empowered to purchase and take over from the above-named parties the

agreement of September 1, 1891, and all the property, rights and privileges comprised therein.

Sect. 4 of the statute contained certain provisions, relating to the option of taking over the railway property reserved to the city by cl. 7 of the conditions of sale, which it is desirable to set out in full: "4. . . . . (2.) If the city of Toronto desire to exercise the right of taking over the property necessary to be used in the working of the railways at the termination of the said period of thirty years it shall, not less than twelve months prior thereto, give to the purchasers or the company, as the case may be, notice of its intention so to do. (3.) After the said city of Toronto shall have given notice of its intention to take over the said property, it may at once proceed to arbitrate under the conditions in that behalf, and both the city and the purchasers or the company, as the case may be, shall in every reasonable way facilitate such arbitration, and the arbitrators appointed in the matter shall proceed so as, if possible, to make their award not later than the time named by the city for taking over the said property. But if from any cause the award shall not be made by such time or if either party be dissatisfied with the award, the city may nevertheless take possession of the said railways and all the property and effects thereof, real and personal, necessary to be used in connection with the working thereof on paying into Court either the amount of such award, if the award be made, or, if not, upon paying into Court or to the purchasers or company, as the case may be, such sum of money as a judge of the High Court of Justice may, after notice to the opposite party, order, and upon and subject and according to such terms, stipulations and conditions as the said Court shall by its order direct and prescribe, provided always that the rights of the parties except in so far as herein specially provided, shall not be affected or prejudiced thereby. In determining such value the rights and privileges granted by the said agreement and the revenue, profits and dividends being or likely to be derived from the enterprise are not to be taken into consideration, but the arbitrators are to consider only the actual value of the actual and tangible property,

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plant, equipments and works connected with and necessary to the operation of the railways, which is not to include any land, property or rights acquired or used in connection with the said street railway, and which do not actually form a part of the said street railway undertaking necessary to the carrying on of the same. (4.) In arriving at such value the arbitrators are to consider and award only the value of the said several particulars to the city at the time of the arbitration, having regard to the requirements of a railway of the best kind and system then in operation and applicable to the said city."

The Toronto Railway Company (which will be referred to as " the Company ") duly purchased and took over the street railways and the property connected therewith, and carried on the railways during the whole period of thirty years, expiring on August 31, 1921.

In the month of June, 1920, the Corporation gave notice to the company under s. 4, sub-s. 2, of the Act of 1892, that it was its intention to exercise its right of taking over at the end of the period of thirty years the property necessary to be used in connection with the working of the tramways, and this notice was accepted by the company. In June, 1921, three arbitrators (Mr. Hume Cronyn, Sir Thomas White and Sir Adam Beck) were appointed under cl. 7 of the conditions of sale and s. 4, sub-s. 3, of the Act, to determine the value of the property to be taken over. The arbitration was formally opened in that month, but at the request of the parties the hearing of evidence was postponed until the month of September following. On August 25, 1921, an order was made by Latchford J. that, upon the Corporation paying to the company the sum of $1,000,000 and paying into Court the sum of $500,000 to abide the event of the arbitration pending between the parties, the Corporation should be at liberty to take possession of the railways of the company and all property necessary to be used in connection therewith immediately upon the expiration of August 31, 1921, pursuant to s. 4, sub-s. 3, of the Act, and also that the Corporation should be entitled to credit against the purchase price as

ascertained in the arbitration a further sum of $1,000,000, being part of the amount due by the company to the city in respect of percentages. The Corporation duly paid the above sums of $1,000,000 and $500,000, and at midnight on August 31, 1921, took possession of the railways and other property.

The arbitration then proceeded, and on January 30, 1923, the arbitrators by a majority (Mr. Hume Cronyn and Sir Thomas White) made an award, whereby they fixed the value of the property which the city was under an obligation to take over at $11,188,500. Sir Adam Beck, the remaining arbitrator, dissented from the award, but did not name an alternative figure. The majority of the arbitrators issued to the parties a full and lucid statement of the reasons for their award, to which reference will be made later in this judgment.

The Corporation being dissatisfied with the result of the arbitration moved in the Supreme Court of Ontario by way of appeal from the award, and also to set it aside on the ground of certain errors in law which were alleged to appear upon the face of it; and the company also moved to remit the award to the arbitrators on certain other grounds of law. Both motions came before Logie J. who, without entering upon the merits of the motions, dismissed them pro forma to enable appeals to be taken to the Appellate Division. Appeals were accordingly taken to the Appellate Division, and that Court on September 24, 1923, made an order whereby they (1.) dismissed the appeal of the Corporation against the award, (2.) on the motion of the Corporation to set aside the award varied the award by striking out of it the value of certain property which the city had objected to take over as not being necessary for working the tramways but which the arbitrators had held to be necessary for that purpose, and also by striking out an allowance for interest, but otherwise refused the motion, and (3.) dismissed the company's motion to remit the award to the arbitrators. Hence the present appeal and cross-appeal.

The appeal of the city relates exclusively to the method adopted by the arbitrators in valuing the several properties

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taken over ; and before considering the objections put forward it is desirable to describe in greater detail the reasons given by the arbitrators for their award. In these reasons the arbitrators described the property to be valued by them as follows : " The property which it is the duty of the Board to value in accordance with the provisions of the agreement and the statute consists of railway tracks and sub-structures, overhead and underground distribution system, rolling-stock, sub-stations with their equipment, land and buildings (including car-building and repair shops and car-barns), tools, and other chattels necessary to be used in connection with the working of the railway."

As to the method or principle to be adopted in making the valuation they referred in detail to the provisions of the Ontario Act above referred to (55 Vict. c. 99, s. 4) and to cl. 7 of the conditions of sale, and stated their conclusions as follows : " The principal question, it seems to us, is, what is the actual value as of the time of the arbitration of the actual and tangible property, plant, equipments, and works connected with and necessary to the operation of the railways? The several qualifications referred to above must be kept constantly in mind in making the valuation."

The arbitrators then proceeded to consider how they were to arrive at such actual value, and after quoting certain decisions (such as *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (1) and *Melbourne Tramway and Omnibus Co.* v. *Tramway Board* (2)), in which the valuation of tramway property at the sum which it would cost to reconstruct it, subject to a deduction for depreciation, had been approved by the Courts, they proceeded as follows : " As to all plant in situ, such as track with sub-structures, overhead and underground distribution system, machinery and equipment fixed in place for use in the operation of the railway, it seems clear from the foregoing decisions and judicial utterances that an approved method of determining their value is cost of reproduction at the time as of which the valuation is to be made, less a proper allowance for depreciation. Counsel for

(1) [1894] A. C. 456. (2) [1919] A. C. 667.

the railway company contended that the word ' depreciation ' as used in these decisions means only physical wear, and that obsolescence, unless so complete as to require or justify immediate removal of the item of plant under consideration, is not to be considered. We do not concur in this view. We understand the word ' depreciation ' occurring in the decisions cited to include obsolescence and deterioration from whatever cause, and not as confined to physical wear and tear, and to what might be called ' obsoleteness ' as distinguished from ' obsolescence ' at the time of valuation. The fact and degree of obsolescence must be determined from the evidence upon the point, having regard to good practice in railway administration and to the qualification of the above-recited sub-s. 4 of s. 4 of the statute.

" With respect to immovable plant in situ, this method of valuation seems the most practicable and convenient. In applying it, however, care must be taken to make full deduction for depreciation as defined. Take the case of a section of track which has become so worn that it should, having regard to good practice, be taken up and replaced by new construction. The cost of reproduction of the section in question might be quite large, but there would have to be deducted an amount for depreciation which would leave only scrap value remaining. In cases of parts or articles connected with plant in situ which, although useful, are not now being manufactured, value may be estimated by reference to prices of parts and articles which can be bought to-day, taking into account, of course, comparative utility, depreciation and all other relevant considerations.

" The same method (reproduction cost, less depreciation) may, we think, be useful also in valuing the rolling stock of the railway company, as was done by the arbitrator in the *Melbourne Tramway* case (1) referred to above. In the case before the Board, where so many of the cars taken over are of older types, it would, however, be most difficult to make the valuation solely by reference to cost of reproduction new, less depreciation. We have had placed before us, however, a

(1) [1919] A. C. 667.

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great deal of evidence as to the character of this rolling-stock, its original cost of construction, reproduction cost, physical deterioration, degrees of obsolescence, and as to alleged defects and advantages from the operating standpoint. All this evidence has been given its due weight in reaching conclusions as to the value of the rolling-stock.

"The principle of reproduction cost less depreciation is also of service in valuing buildings, such as car-barns, car-construction and repair shops, sub-stations and the plant and machinery which they contain. Care must be taken here also to make full deduction for depreciation (including obsolescence) and to take into account the evidence adduced bearing upon the question of the suitability of such buildings, plant and machinery for the purposes for which they are being used, and, generally, all factors bearing upon the matter of their usefulness and fair value, subject to the qualifications of the agreement and statute.

"With regard to tools, stores and small chattels (fixed or unfixed) generally, it is not necessary to go to the trouble of considering what it would cost to reproduce them new and then deduct an amount for depreciation. We have had evidence as to the market value of such chattels or of others which would serve as well or better, and from such market value and comparison and other evidence relating to use, condition and extent of depreciation a conclusion as to value may be reached.

"As to land (other than land acquired from and now retaken by the city) it seems to us that it should be valued at its fair value as of the time of the arbitration. In estimating its fair value we are, we think, entitled to consider, in addition to other relevant factors of value of individual parcels, their suitability (having regard to size and location) for street railway purposes. As to the land (including buildings) acquired from the city by the purchasers, and particularly referred to in cl. 7 of the conditions, the question is, what is its fair value without reference to its value for the purpose of operating a street railway?"

The arbitrators concluded this part of their reasons by the

following statement : " Speaking generally, we have had before us an immense amount of evidence dealing with the suitability, physical condition, depreciation, original cost of construction or purchase price, cost of reproduction and overhead costs connected with reproduction, of all the properties, real and personal, taken over by the city. All this evidence has been considered in its bearing upon the question of value. In this connection we have kept before us the language of the Honourable Chief Justice Meredith delivered on December 16, 1921, upon a case stated by the Board for the opinion of the Court upon a point as to the relevancy of certain evidence. He says : 'There is no law which limits arbitrators to one method of determining value ; any and every method that may be helpful may be applied. Actual cost, reproduction cost and market value—direct or indirect—or actual value, may each and all give assistance ; or only one may be useful, according to the nature and circumstances of the particular enquiry.'

" All evidence adduced by both sides has been carefully considered and given its due weight in its bearing upon the question of actual value at the time of the arbitration, having regard to the provisoes and qualifications of the agreement and statute. The Board has also had the advantage of an inspection of the land and buildings, railway, plant and equipment of the company."

Having disposed of these general considerations, upon which they based the principal items in their valuation, the arbitrators proceeded to deal with certain more special questions which had been raised by the parties ; and their decisions on such of these questions as are now material to be referred to may be summarized as follows :—

(*a*) They rejected a contention on the part of the company that in estimating the cost of reproduction they should take into account the rates of wages and prices obtaining during a period of three years prior to September 1, 1921, on the assumption that if the city had been obliged to construct a railway system which was to be available on that date it

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must have begun operations three years earlier, adding: "It seems to us that, so far as the principle of reproduction cost less depreciation is availed of, it must be reproduction cost as of 'the time of the arbitration.'"

(*b*) They rejected a contention on behalf of the city that in estimating the cost of reproduction they should base their estimates upon the prices of material and rates of wages prevailing before the war, as such prices and rates would have varied had there been no war and had the trend of prices and wages in progress before the war continued down to the time of the arbitration, adding: "In our opinion, it would be impossible to determine the 'actual value at the time of the arbitration' upon such a hypothetical basis, which has no reality in fact, and consequently seems opposed to the meaning contained in the word 'actual' in the expression 'actual value.' We do not conceive that the valuation as of the time of the arbitration should have precise regard to the prices of labour or of material as of a specific date such as September 1, 1921. Where the method of reproduction cost less depreciation is used or market prices are considered, regard should be had to the evidence as to construction cost and prices generally as of the time of the arbitration. In view of the stress laid by counsel for the city upon war-time costs and speculative prices, it may be pointed out that the war has been over for more than four years and that since the date of taking over the railway prices of commodities and cost of labour have, according to the evidence, become fairly stabilized."

(*c*) They dealt in detail with certain items of overhead expenditure, preliminary expenses and other "intangible" items for which the company claimed credit.

(*d*) They rejected a claim by the company that payments made by the company towards the cost of construct-

ing a subway in Avenue Road under the tracks of the Canadian Pacific Railway and a bridge (known as the Don Bridge) over the steam railways on Queen Street East should be included in the valuation of the track on the following grounds: "These payments were made by the company in pursuance of Orders of the Board of Railway Commissioners for Canada, the object being the elimination of dangerous level crossings and consequent protection and convenience of the public. It does not appear to us that these payments constitute 'actual and tangible property' within the meaning of the statute, and we have been unable to agree with the argument put forward by counsel for the company that these payments became, so to speak, attached to or inherent in the cost of construction of the tracks of the company carried through the subway and over the bridge respectively. By mandatory orders the Board of Railway Commissioners assesses these payments against the company, and we cannot see that they may be taken into consideration by the Board in estimating the cost of reproduction of the railway track."

(*e*) They included in their award, though with some doubt, interest upon the amount of the valuation from the time when the railway was taken over by the city to the date of the award.

(*f*) With regard to the items of property which the city objected to take over on the ground that they were not "necessary to be used in connection with the working of the railway" (which items were set out in detail in Sch. B to the award), the arbitrators considered that they had authority to decide whether such items in fact came within the above description, and held that certain items came within the description and the value thereof should be allowed, but that certain other items of property, including (*a*) the main office building of the company, (*b*) the

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"Scarboro' Bridge property," and (*c*) the "King Street and St. Lawrence Street property," were not necessary to be used in connection with the working of the railway, and accordingly were not to be included in the valuation.

Appeals against the award having been brought as above mentioned, the Supreme Court, on the application of the city, varied the award by striking out of the award and valuation the sums allowed in respect of certain of the items set out in Sch. B of the award on the ground that the arbitrators had no jurisdiction to determine whether those items were or were not necessary to be used in connection with the working of the railways, and that the parties must first have their necessity established within the terms of the contract before an arbitration could be had as to their value; and also by striking out the allowance of interest on the value as ascertained by the arbitrators on the grouud that, though it was equitable that interest should be paid from the time of taking possession, there was no warrant for including it in the award; but in other respects the appeals were dismissed. Hence the present appeals.

In support of the appeal of the city counsel raised two points relating to the methods of valuation adopted by the arbitrators.

First they contended that, in valuing certain parts of the property taken over, and especially in valuing the rolling-stock, buildings, and track, the arbitrators had proceeded on the theory that in every case the value must be taken to be what it would cost to reproduce the items less depreciation, and that no such method should have been applied to this property in the present case. The proper course, they urged, having regard to the provision of s. 4, sub-s. 4, of the Act of 1892, was first to consider whether, having regard to size, suitability, location and other factors, a reasonable person would reproduce these assets as part of a Toronto railway system in 1921, and if not to value them on the basis of what they would fetch, or if no sale were possible, then on a "scrap" basis. In their Lordships' opinion this argument proceeds on

a misconception as to what the arbitrators did. No doubt they took reproduction cost less depreciation as affording a serviceable guide in valuing the track, rolling-stock, and buildings; and in this they were fully justified by the authorities cited. Indeed it is difficult to see how such items as fixed plant in situ, car-barns, car-construction and repair shops, sub-stations and the machinery which they contain, could have been valued except with the assistance of some such principle. But the arbitrators were careful to make it clear that they had by no means adopted reproduction cost less depreciation as the only and sufficient test of value. In valuing the track and other plant in situ they allowed (as the above quotations show) not only for wear and tear, but for "obsolescence," and had regard to good practice in railway administration and to s. 4, sub-s. 4, of the Act, and also to comparative utility and other relevant considerations. So, in valuing rolling-stock, they gave due weight to character, obsolescence and alleged defects and advantages from the operating standpoint; and with regard to buildings, suitability and other matters bearing upon their value were plainly not neglected. If the statements made by the arbitrators in the reasons for their award as to the methods which they had adopted in making their valuation are accepted as correct—and there is no reason whatever for not so accepting them—it will appear that they not only proceeded on lines which had been approved by many decisions of the House of Lords and of this Board, but gave due weight to the special provisions of the Act of 1892 and to all the circumstances of the case. This contention therefore fails.

But secondly it was contended on behalf of the city that in cases where reproduction cost had to be taken into consideration that cost should have been estimated, not on the basis of the prices of labour and materials which were current at the date of the valuation, but either on normal prices or on the "trend basis" referred to in the above extract from the arbitrators' reasons marked (*b*). You cannot, it was said, apply the theory of reproduction at current prices at a time when, having regard to the abnormal prices actually current,

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no reasonable man would reproduce the subject matter at those prices. Their Lordships agree with the arbitrators in holding that they were under no obligation to proceed on any such imaginary basis. At the time when the valuation was made prices had (the arbitrators say) become fairly stabilized; and in determining actual value at that time they were entitled to have regard to the prices then generally current.

For these reasons their Lordships are of opinion that the appeal of the city fails.

Passing to the cross-appeal, it will be necessary to deal first with an objection taken by the company to the method of valuation adopted by the arbitrators. In applying the principle of reproduction cost less depreciation, it was argued, the arbitrators should have estimated reproduction cost upon the basis mentioned under the above heading marked (*a*), that is to say, upon the basis of the prices of labour and materials which were current during the three years next preceding September 1, 1921. The right method, it was said, was to consider what must have been paid by a contractor who had contracted to have the property in question ready on that date, and such a contractor would have expended three years in the work of construction and would have proceeded upon the prices from time to time current during that period. In their Lordships' opinion this argument is equally untenable. There is not sufficient evidence to show that a period of three years must have been expended in construction, and indeed it is plain that as to some of the property in question a much shorter period would have sufficed. But in any case there is no warrant for pushing the hypothesis of reconstruction to this length, and the arbitrators were entitled to base their valuation on the prices generally current at the time of the arbitration. In short, the argument which disposes of the "trend basis" disposes of the "three years' basis" also.

The remaining points taken on the company's cross-appeal related to the decisions of the arbitrators summarized above under the headings (*c*) to (*f*), and may be considered under like headings.

(*c*) The objection to the finding of the arbitrators as to overhead expenditure was abandoned.

(*d*) It was contended that the payments made by the company towards the cost of the Avenue Road subway and the Don Bridge should be included in the valuation of the track. A track over a bridge or in a subway, it was said, was worth more than a track on a level road, and should be valued accordingly. In their Lordships' opinion this argument should prevail. It is true that, as the arbitrators point out, the payments in question were not "actual and tangible property" within the meaning of s. 4, sub-s. 3, of the statute; the payments as such represent cost and not value. But the asset produced by means of the payments—namely, a track passing under the Canadian Pacific line and over the stream railways in Queen Street and so escaping both these obstructions to traffic—is still in existence and available to the city; and it could hardly be reproduced except by means of an expenditure at least equivalent to the contributions made by the company: see Lord Low's judgment in the *Edinburgh Tramway* case. (1) In their Lordships' opinion the sum of $125,000, fixed by the arbitrators as representing these payments properly depreciated, should be allowed.

(*e*) The company claimed that the award of the arbitrators, so far as it allowed interest on the value of the property taken over from the date when possession was taken to the date of the award, should be restored. Upon this point their Lordships agree with the view taken by the Supreme Court. The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established, and has on many occasions been applied to compulsory purchases; and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case. But the duty of the arbitrators in this case was not to determine all the rights of the company, but only to ascertain the actual value of certain property at a certain time; and it is a truism to say that such value cannot include interest upon it. The

(1) (1894) 21 R. 688, 695.

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liability for interest depending upon the principle stated lies outside of the arbitration for its enforcement.

(*f*) Lastly, it was contended on behalf of the company, contrary to the decision of the Supreme Court, that the arbitrators had jurisdiction to determine whether the disputed items of property comprised in Sch. B to the award were or were not necessary to be used in connection with the working of the railway, and accordingly that the value of the items of this character allowed by the arbitrators and struck out by the Supreme Court should be restored. It was also contended that as to the above items marked (*a*) (*b*) and (*c*) the arbitrators were wrong in law in holding them not necessary to be so sued.

Upon the question of the arbitrators' jurisdiction their Lordships are unable to agree with the decision of the Supreme Court. No doubt it is true, as pointed out by Hodgins J., that the arbitrators were only authorized to ascertain the value of property necessary for the working of the railways ; but it was impossible for them in this case to fix a sum representing that value without incidentally determining (in case of dispute) what items were to be included in it. The question of " necessity," like the question of value, was a question of fact. Both questions had to be determined before the arbitrators could name a sum as representing the value of the " necessary " property ; and both were, in their Lordships' opinion, committed to the arbitrators for decision. The decisions in *In re Manchester Tramway Co. and Manchester Corporation* (1) and *Manchester Carriage Co.* v. *Swinton Urban District Council* (2) appear to be in point. The value of the items allowed by the arbitrators, amounting to $543,500, should therefore be restored to the award.

As to the particular items which were disallowed by the arbitrators and which were in question on the cross-appeal, their Lordships have come to the following conclusions :—

(*a*) As to the head office of the company the arbitrators have found that from the standpoint of the administration of the railway a head office was necessary,

(1) (1904) 87 L. T. 504.

(2) [1906] A. C. 277.

that the office in question was situated on a convenient site, and that at the time of the taking over of the railway it was being used for the purposes of the company and was "practically" used only in the operation of the railway. In their Lordships' opinion the true legal inference from these findings is that the office was within the meaning of the conditions necessary to be used in connection with the working of the railway. The value, fixed by the arbitrators at $170,000, should therefore be added to the award.

(*b*) The Scarboro Bridge property belonged at the time of the taking over of the railway to a subsidiary company in which the appellant company held a controlling interest; but it was not the property of the appellant company, and that company had no title to it. In these circumstances their Lordships are of opinion that the arbitrators acted rightly in excluding it from their valuation.

(*c*) The King Street and St. Lawrence Street property was found by the arbitrators not to be necessary to be used in connection with the working of the railway, and they add: "The city took possession and for a time occupied a small parcel of this property used as a compressor station. The parties, however, having agreed that the property shall be dealt with as a whole and that the compressor station shall follow the fate of the major part of the property, we have included nothing in our award for said station." Their Lordships see no reason for questioning the decision of the arbitrators on this point.

This disposes of the points raised in these appeals; and, for the above reasons, their Lordships are of opinion that the appeal of the city should be dismissed with costs, and that the appeal of the company should be allowed as to the Avenue Road Subway and Don Bridge, the items in Sch. B to the award allowed by the arbitrators, and the main office buildings, but otherwise should be dismissed. As the company have

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only partly succeeded in the cross-appeal, there will be no costs of the cross-appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the City Corporation: *Freshfields, Leese & Munns.*

Solicitors for the Railway Company: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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ONTARIO AND MINNESOTA POWER COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Statutory Power—Order in Council—Order reciting statutory Liability for Damage—Incorrect Recital—Dam built in exercise of Power conferred by Order—Liability for Flooding.

The appellant company built a dam across a navigable river which flowed out of a lake in Ontario. In doing so the company was exercising a power conferred by an Order in Council made under a Dominion Act which had adopted the terms of a grant made by the Province to the company. The Order in Council recited that the Chief Engineer of the Public Works Department had reported that the company's Act of incorporation made the company liable for all damage to lands caused by its works. The Act of incorporation did not so provide. The dam caused the level of the water in the lake to rise, so that lands bordering upon it, and forming part of the lands reserved for Indians, were flooded and damage thereby caused:—

Held, that the company was liable for the damage caused. First, because the grant, upon its true construction, did not authorize the company to raise the level of the water so as to cause damage; secondly, because the company, having taken the benefit of the Order in Council, must be taken to have accepted the recital as being correct.

Smith v. *Ontario and Minnesota Power Co.* (1918) 44 Ont. L. R. 43 approved.

Judgment of the Supreme Court affirmed, subject to variations.

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* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD CARSON, and LORD BLANESBURGH.

APPEAL (No. 68 of 1924) by special leave from a judgment of the Supreme Court of Canada, delivered on December 22, 1920, reversing a judgment of the Exchequer Court of Canada, delivered by Audette J.

The action was brought in the Exchequer Court by the Crown, upon the information of the Attorney-General for Canada, in the circumstances which are fully stated in the judgment of the Judicial Committee.

The trial judge, Audette J., dismissed the action save as to part of the claim, in respect of which he awarded $500 damages without costs.

An appeal by the Crown to the Supreme Court of Canada (Idington, Duff, Anglin, Brodeur and Mignault JJ.) was allowed in part, and the action was referred back to the Exchequer Court to assess damages. Duff J., who dissented, took the view that the reservation contained in s. 2 of the Ontario statute, 5 Geo. 5, c. 12, should be construed as embracing all the lands below the 497 mark.

1924. July 18. *Tilley K.C.* and *C. F. H. Carson* for the appellants.

E. L. Newcombe K.C. and *Bristol* for the respondent.

Oct. 23. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by the Ontario and Minnesota Power Company, Ld., from a judgment of the Supreme Court of Canada by which the appellants were held liable for all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of certain Indian reserves bordering on the Rainy Lake by reason of a dam erected by the appellants in the Rainy River. The appellants do not deny that some damage was caused by their dam, but they justify under a grant made by the Government of the Province of Ontario in the year 1905 ; and the question is whether that grant absolves them from liability.

Before considering the terms of the grant it is necessary to state shortly the history of the reserves in question. By the North West Angle Treaty No. 3 dated October 3, 1873, the

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Salteaux Tribe of the Ojibbeway Indians surrendered to the Crown the extensive reserves to which they were then entitled under the proclamation of 1763, subject to a stipulation that particular reserves should be selected and set aside for them as soon as practicable and should be administered and dealt with for them by the Government of the Dominion of Canada. Power was reserved to the Government of Canada to appropriate such sections of the reserves so set aside as might be required for public works or buildings, due compensation being made for the value of any improvements thereon. Pursuant to this treaty officers were deputed by the Government of Canada to confer with the Indians and select reserves, and on their report the Governor-General by Order in Council dated February 27, 1875, purported to approve the setting aside of certain reserves including the reserves now in question. These reserves have since been occupied by the Indians, being administered for them by the Government of the Dominion under the provisions of the Treaty, of s. 91 (head 24) of the British North America Act and of the Indian Act.

In the year 1888 this Board decided in *St. Catharine's Milling & Lumber Co.* v. *The Queen* (1) that by force of the surrender of 1873 the beneficial interest in the lands in Ontario comprised in that surrender was transmitted to that Province subject only to the Dominion powers of legislation over lands reserved for the Indians ; and it was no doubt in consequence of that decision that in the year 1894 the Governments of the Dominion and of the Province of Ontario, having been empowered by statutes of Canada and Ontario so to do, came to an agreement as to such of the reserves which had been set aside as above mentioned as were found to be situate in that Province.

By this agreement, which was dated April 16, 1894, it was agreed between the two Governments (among other things) as follows : " 2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the Government of Ontario as to the reserves before the passing of the said statutes laid out in the territory, with a view of acquiescing

(1) (1888) 14 App. Cas. 46.

in the location and extent thereof unless some good reason presents itself for a different course. 3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected or in case other reserves in the said territory are to be selected, a joint commission or joint commissions shall be appointed by the Governments of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves." No action appears to have been taken under these clauses until the passing of the Act of 1915 hereafter referred to, and the Indians continued to enjoy the selected reserves.

Matters were in this position when in the year 1905 the Government of Ontario made the grant which is in question in these proceedings. By the deed of grant, which was dated January 9, 1905, and was made between the Commissioner of Crown Lands for the Province of Ontario (thereinafter called the Government) of the one part and E. W. Backus and others (thereinafter called the purchasers) of the other part, after recitals showing that the Rainy River formed the international boundary between the Province of Ontario and the city of Minnesota and formed in the neighbourhood of the town of Fort Frances a valuable water power, and that the purchasers were the owners of the lands and water power on the Minnesota side opposite to Fort Frances, the Government agreed to sell to the purchasers certain land at Fort Frances including a part of the bed of the river at that point, and the purchasers agreed to construct a dam across the river and to develop and supply power to the full capacity of the river in manner therein provided.

It is desirable to quote in full the following clauses of the deed :—

" 2. The purchasers covenant and agree to construct a dam, conduit or such other works on or near the said river at Fort Frances, in accordance with the plans hereto attached, sufficient to develop power to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works) according to the

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plans hereto attached, approved of by the Lieutenant-Governor in Council, and which are hereby made a part of this contract, such dam to be built of solid masonry or concrete and to be of such character and of such dimensions as will make the same amply strong and safe for the purposes intended, and such works will be of such design as will fully provide for sufficient waste weirs to obviate danger in time of floods or freshets. The dams, head gates, waste weirs and works in connection therewith or incidental thereto shall not be proceeded with unless and until the plans, drawings and specifications for the same shall have been submitted to and approved of by the Lieutenant-Governor in Council, which said plans, drawings and specifications shall show the precise site and location of the said work: Provided, however that notwithstanding anything hereinbefore contained, and notwithstanding the approval of the plan hereto attached, the waters of the Rainy Lake shall not at any time be raised to a higher level than may be authorized by the Government, and the height of water to be maintained in the said lake and the use or non-use of the flash boards as shown on said plans shall at all times be subject to such control and direction by the Government as in the opinion of the Government may be necessary to ensure safety and protection of property."

" 17. It is distinctly understood and agreed that the lands, rights and privileges mentioned in this agreement are confined solely to lands, rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government, and if damage is done by the erection of any dam or the construction of any works under this agreement no recourse shall be had against the Government in respect thereof."

The plan attached to this grant showed a dam across the river of which the crest was to reach the bench mark 497, an arbitrary datum which indicated approximately the high water mark reached by the river in ordinary seasons. The

above grant was duly confirmed and the detailed plans, drawings and specifications approved by the Lieutenant-Governor of Ontario in Council.

The above grant obviously concerned, not only the Province of Ontario, but also the Government of the Dominion as custodian of the Indian reserves which were the subject of the agreement of 1894 and of the navigation of the lake and river. Accordingly by a statute of Canada passed in 1905 (4 & 5 Edw. 7, c. 139) it was enacted that the appellant company might develop and operate the water power on the Rainy River at or near Fort Frances and construct, operate and maintain dams and other works in connection with the said power, but it was provided that no work so authorized should be commenced until the plans thereof should first have been submitted to and approved by the Governor-General in Council. In pursuance of this Act plans showing the nature of the proposed works were submitted to the Minister of Public Works of the Dominion and on his recommendation were approved by an Order of the Governor-General in Council dated September 19, 1905, " subject to the conditions inserted in the agreement between the Government of the Province of Ontario and the applicants, and also subject to all the conditions and reservations expressed in the Act of Parliament passed at its last session respecting the Ontario and Minnesota Power Company, Limited." Some changes were afterwards made in the plans, but having regard to their Lordships' opinion on the other questions raised in the appeal these need not be further referred to. The dam was completed about the year 1909.

In the year 1915 the Legislature of Ontario passed a statute (5 Geo. 5, c. 12) by which, after reciting that in pursuance of the terms of the agreement dated April 16, 1894, the Government of Ontario had made full inquiry as to the reserves laid out as therein mentioned and it had been decided to acquiesce in the location and extent thereof (with an exception not now material) subject to the modifications and additional stipulations set forth in the Act, it was enacted as follows : " 1. The said reserves as shown on said plans, with the exception of

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Indian Reserve 24C, in the Quetico forest reserve, are hereby transferred to the Government of Canada, whose title thereto is hereby confirmed, and subject to all trusts, conditions and qualifications now existing respecting lands held in trust by the Government of Canada for Indians, and subject to the provisions of the following sections. 2. All water powers which in their natural condition at the average low stage of water have a greater capacity than 500 horse-power, and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly surrounded by an Indian reserve or reserves and islands wholly within such headlands shall not be deemed to form part of such reserve, but shall continue to be the property of the Province, and the Bed of Navigable Waters Act shall apply, notwithstanding anything contained in the fourth paragraph of the agreement hereinbefore mentioned."

Passing now to the facts which gave rise to this litigation, it appears that in several years after the erection of the appellants' dam the Indian reserves bordering on Rainy Lake and on the Rainy River where it issues from the lake about two miles above the dam, known as reserves No. 1, No. 18B and No. 16D, were injured by floods which were wholly or partly attributable to the action of the dam. In some of these years the water rose above the 497 bench mark, and in the year 1916, when there was an extraordinary flood, it is said to have risen above the 500 mark. The result of this flooding was that crops and other property belonging to the Indians were injured or destroyed and the land itself was washed away or eroded and a number of trees were killed. The Dominion Government claimed from the appellants compensation for these injuries, and after some correspondence the Attorney-General of Ontario filed this information against the company, claiming on behalf of the Indians (on whose behalf he was authorized to sue by the R. S. Can., 1906, c. 81 as amended) $3153 to compensate them for damage done to their property on the three reserves and also claiming on behalf of His

Majesty $19,360 for damage caused to reserve No. 1 known as Pither's Point.

The suit was heard by Audette J., who held that on the selection of the reserves in question in 1875 a road-space two chains in depth along the shore of Rainy Lake had been excepted out of the reserves; that the raising of the water of the lake up to the bench mark 497 was authorized by the grant of 1905; that the title acquired by the Dominion in 1915 was subject to an exception of the road-space and to the terms of the grant of 1905; and accordingly that the Attorney-General was only entitled to compensation in respect of damage caused to property lying beyond the road-space two chains in depth by raising the water above the level of bench mark 497. Upon this footing he estimated the damages caused by such flooding at $500 and directed that if this figure was not accepted there should be an enquiry as to damages.

Both parties having appealed against this judgment to the Supreme Court of Canada, that Court (by a majority) held that neither the reservation of the road-space nor the right to flood the reserves by raising the level of the water up to bench mark 497 was established; and they accordingly set aside the judgment of Audette J. and ordered and adjudged as follows: "That His Majesty the King in the right of Canada do recover from the defendant all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of the lands comprised in the Indian reserves, whose boundaries extend in all cases to the water's edge as shown on the plan marked exhibit 70 at the trial of this action, where such flooding or erosion was occasioned by the level of the waters bordering the said lands being raised or maintained from time to time since the construction of the defendant's dam and works to or at higher levels than the said waters would have attained or maintained had the said dam and works not been constructed." And the Court ordered that the cause be referred back to the judge of the Exchequer Court to ascertain the amount of the said damages if any. It is against this judgment that the appellants have appealed to this Board.

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It was argued on behalf of the appellants that the title of the Dominion to the reserves in question is held subject to the grant made by the Province to the appellants in 1905, and their Lordships are of opinion that this contention is justified. It may well be that, having regard to the terms of the agreement made between the two Governments in the year 1894 (which was the agreement referred to in the case of *Ontario Mining Co.* v. *Seybold* (1)), the Government of the Province had no authority to make a grant affecting the reserves referred to in that agreement without the assent of the Government of the Dominion. But the Dominion by its Act of 1905 (4 & 5 Edw. 7, c. 139) and the Order in Council made under that Act adopted and confirmed the grant to the appellants subject only to the additional conditions contained in those instruments; and accordingly the grant is now binding (subject to those conditions) on the Dominion, and the only question to be determined is the construction of the grant.

Then did the grant authorize the appellants to raise the water of the Rainy Lake above the ordinary level and so to flood the reserves? In their Lordships' opinion this question should be answered in the negative. The grant does indeed authorize the appellant company to construct a dam having its crest at bench mark 497 and to "develop the water power to the full capacity of the stream from side to side at high water mark"; and it may be that the raising of the level of the upper part of the river by means of the dam would to some extent affect the level of the lake. But under the terms of the grant the dam was to be provided with weirs sluices and other apparatus sufficient to regulate the head of water above it; and it was expressly provided by cl. 2 of the deed that notwithstanding anything therein contained and notwithstanding the approval of the plan thereto attached the waters of the Rainy Lake should not at any time be raised to a higher level than might be authorized by the Government. This proviso appears to their Lordships to have been intended to override the powers given by the deed to the appellant company and to compel them, in the absence of express

(1) [1903] A. C. 73.

authority by the Government to the contrary (which was not obtained), so to operate their works that they should not have the effect of raising the waters of the lake beyond their ordinary level to the detriment of the adjoining property. Further it was provided by cl. 17 of the deed that the lands rights and privileges therein mentioned were " confined solely to lands rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario " and that no permission was given thereby to the purchasers to overflow or cause to be overflowed any other lands ; and these stipulations appear to have been intended to protect from flooding the Indian reserves, which were under the control and administration not of the Province but of the Dominion. If so it follows that the appellants had no authority to cause the waters of the lake to flood the reserves and are liable in damages for so doing.

The above conclusion is supported by the terms of a recital contained in the Order made by the Governor-General in Council on September 19, 1905, to which reference has not yet been made. That Order contained a recital that the Chief Engineer of the Department of Public Works had reported " that the only objection that could be raised to the proposed elevation of the dam is provided for by a proposed revetment wall to be constructed by the company and also by a clause in the Act of incorporation of the company which makes all damages to lands caused by their works a charge to be borne by them." The report so made by the Chief Engineer was incorrect, for the Act of incorporation of the company contains no such clause as is here mentioned. The Chief Engineer appears to have obtained the information on which his report was based from a report made to him by Mr. Gray, the engineer in charge ; and there is nothing to show from what source Mr. Gray derived the information, or to connect the appellant company with the misstatement contained in these documents. But what is certain is that the appellant company took the benefit of the Order in Council, the terms of which must have been known to them, and it does not appear that they took any steps to inform the Government of the Dominion that the

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recital was incorrect. This being so, their Lordships agree with the decision of Riddell J. in *Smith* v. *Ontario and Minnesota Power Co.* (1) that the appellants must be taken to have accepted the recital as correct, and accordingly must be held liable for compensation for damages caused by their works. A correspondence which took place between the Department of Indian Affairs and the appellants in the years 1906–1909 proceeded upon the footing that the appellants were liable for damages caused by flooding, and they did not then dispute their liability.

For the above reasons their Lordships agree in the main with the decision of the Supreme Court of Canada, but they are of opinion that the judgment pronounced by that Court requires to be varied in two respects.

In the first place their Lordships are unable to agree with the Supreme Court in holding that the three reserves in question extend to the water's edge. The evidence as to the setting aside of the reserves in 1875 is incomplete; but it appears from a report of a Committee of the Privy Council appointed to deal with the matter that the persons appointed to select the reserves had recommended "two chains in depth along the shore of Rainy Lake and the bank of Rainy River to be reserved for roads, right of way to lumber-men, booms, wharves and other public purposes"; and this recommendation appears to have been accepted by the Committee and approved by the Governor-General in Council. Further, a map (exhibit Q) dated in July, 1876, and produced by the Indian Department, shows this road as having been excepted out of all the reserves abutting on the lake. It is true that in the year 1889 the Department of Indian Affairs, in answer to a request of the Commissioner of Crown Lands for Ontario for a tracing of the reserves, forwarded a plan (exhibit 70) not showing the roadway; and this appears to have been the plan which was referred to in the Act of 1915. But the reserves transferred by that Act were the reserves as laid out in 1875; and if on the laying out of the reserves the road was excepted, as appears to have been the case, the Act of 1915 would not

(1) 44 Ont. L. R. 43.

have the effect of adding it to the reserves. The plan exhibit 70 must therefore be rejected as falsa demonstratio. On the whole their Lordships are satisfied that the two chains in depth were not included in the reserves and accordingly did not pass to the Dominion by the Act of 1915.

In the second place it appears that on May 18, 1910, His Majesty by the Superintendent-General of Indian Affairs, leased a part of reserve No. 1 (known as Pither's Point) to the corporation of the town of Fort Frances for a term of 99 years, such part to be used for park purposes subject to the right of the Indians to camp and sell wares upon it. This lease was apparently invalid at the time, as the title to the land was in the Province ; but it appears to be now effective, the land having been acquired by the Government of Canada in 1915. On August 19, 1918, just before the commencement of this suit, the municipality of Fort Frances released to the Crown that portion of the land lying along the shore of Rainy Lake which would be covered by water when the latter was raised to the 497 bench mark and all trees killed at high water during 1916, and also purported to assign to the Crown all claims that they might have against the appellant company or other persons for damages to the said lands caused by raising the waters adjacent thereto ; but this deed was not effective to pass a right of action for damages for wrongs already committed. It follows that as regards the land comprised in this lease, and apart from the right of the Indians to compensation, the Government of Canada can only recover for injury to its reversion.

For the above reasons their Lordships are of opinion that the judgment of the Supreme Court of Canada should be varied by striking out the words " whose boundaries extend in all cases to the water's edge as shown on the plan marked exhibit 70 at the trial of this action " and substituting a statement that the boundaries of the reserves extend to a line two chains distant from the water's edge as shown on exhibit Q, and also by adding a declaration that as to so much of reserve No. 1 as is comprised in the lease of 1910 the damages recoverable by His Majesty are limited to the damage sustained

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by the Indians together with the injury (if any) caused to the reversion of His Majesty expectant upon the determination of that lease, but that in all other respects the judgment should be confirmed. As the appellants have only partly succeeded, there will be no costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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GREAT WEST PERMANENT LOAN COMPANY . . . . . } APPELLANTS;

AND

FRIESEN AND OTHERS . . . . . RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN.

Canada (Saskatchewan)—Registration of Titles—Equitable Rights—Unregistered Transfer—Mortgagee without Notice of Breach of Trust—"Registered"—Documents lodged for Registration—Land Titles Act (R. S. Sask., 1920, c. 67), ss. 27, 58.

Sect. 58, sub-s. 1, of the Land Titles Act of Saskatchewan provides that after a certificate of title has been granted no instrument until registered shall pass any estate or interest in the land, or render it liable as security, save as against the person making the same.

Owners of land in Saskatchewan who were registered under the Act and holders of certificates of title, having contracted to sell the land, executed transfers and deposited them with trustees who were bound by the contract to retain them until the purchasers paid a specific part of the price. The transfers showed that at the date of their execution the money had not been paid. Before the money was paid the trustees handed some of the transfers to the purchasers, who without registering them mortgaged the land therein comprised. The mortgagees had no notice of the breach of trust and acted without negligence. After the

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* *Present:* VISCOUNT CAVE, LORD BLANESBURGH, MR. JUSTICE DUFF, and SIR ADRIAN KNOX.

payment of the money by the purchasers the mortgagees applied to register their mortgages :—

Held, (1.) that the Act recognized unregistered equitable interests; (2.) that but for the trustees' knowledge of the breach of trust the transfers would have created in them an equitable interest which was assignable upon payment of the money; (3.) that the mortgagees having no notice of the breach and having acted without negligence, the transfers operated as representations to them that the trustees had such an interest; and (4.) that, accordingly, the mortgagees were entitled to have the mortgages to them registered under the Act.

Barry v. *Heider* (1914) 19 C. L. R. 197 approved and applied.

The transfers and mortgages having been lodged at the Land Titles Office for registration were entered in the receiving book in accordance with s. 23 of the Act, and some of the documents were entered in the day book in accordance with s. 25, but none had been entered in the register on the folios constituting the existing certificates of title as provided by s. 27.

Held, that none of the documents were "registered" within the meaning of s. 58 of the Act.

Judgment of the Court of Appeal varied.

CONSOLIDATED APPEALS (Nos. 67 and 90 of 1924) from a judgment of the Court of Appeal of Saskatchewan, delivered on February 18, 1924, varying a judgment of the Court of King's Bench, delivered by MacDonald J.

The appeals arose out of two actions brought in the Court of King's Bench for Saskatchewan, and gave rise to questions as to the effect of certain provisions of the Land Titles Act of Saskatchewan (R. S. Sask., 1920, c. 67).

The facts and the effect of the judgments in Canada appear from the judgment of the Judicial Committee.

1924. July 28, 29, 31. *Tilley K.C.*, *Sweatman K.C.* and *Pritt* for the appellants, the Great West Permanent Loan Company.

Horace Douglas for the Mennonite Land Sales Company, Ld., appellants in the two connected appeals.

Clauson K.C., *C. P. Wilson K.C.* and *Bisschoff* for the respondents.

Reference was made to *Howard* v. *Miller* (1); *Barry* v. *Heider* (2); *Farquharson* v. *King & Co.* (3); *Shropshire*

(1) [1915] A. C. 318. (2) 19 C. L. R. 197.
(3) [1902] A. C. 231.

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Union Rys. v. *The Queen* (1); and to the Land Titles Act (R. S. Sask., 1920, c. 67), s. 2, sub-s. 19 (*b*), ss. 23, 24, 25, 27, 49, 58, 62, 75, 195.

Oct. 24. The judgment of their Lordships was delivered by

SIR ADRIAN KNOX. These appeals are brought from judgments of the Court of Appeal of Saskatchewan in two actions. In one, the respondents Friesen and others, trustees of the Mennonite Colony, who will be referred to as "the Mennonite Trustees," were plaintiffs, and the Saskatchewan Mortgage and Trust Corporation, Ld. (hereinafter called "the Trust Company"), the Mennonite Land Sales Company, Ld. (hereinafter called "the Sales Company"), John Murphy, the Great West Permanent Loan Company (hereinafter called "the Loan Company"), J. J. Logan, J. F. Taylor, Geddie McKay, Ld., and J. A. Campbell were defendants. In the other the Sales Company was plaintiff and the Mennonite Trustees were defendants.

In connection with its appeal the Loan Company presented a petition praying for leave to refer to and read on the hearing of the appeal an agreement under seal dated April 2, 1921, to which reference will be made hereafter. On the hearing of the appeals their Lordships allowed this petition. The facts and transactions out of which the litigation arose may be stated as follows :—

The members of the Mennonite colony were the owners of a tract of land near Swift Current in the Province of Saskatchewan, comprising 105,789 acres known as the Mennonite reserve. Individual members of the colony were registered under the Land Titles Act of Saskatchewan as the owners of the several parcels of land comprised in the reserve, and a certificate of title under the Act had been issued to each individual for the parcel in respect of which he was registered as owner. Some of these certificates of title had been deposited as security for advances made to the owners. In the year 1920 the members of the colony desired to sell the whole of the reserve, and on October 28, 1920, the Mennonite Trustees

(1) (1875) L. R. 7 H. L. 496.

entered into an agreement with Geddie McKay, Ld., for the payment of a commission of $4 per acre " upon the sale and execution and delivery of a contract for the sale of the said lands." No question was raised as to the authority of the Mennonite Trustees to make either this agreement or the agreements into which they entered later, on behalf of the individual members of the colony who were registered as owners, or as to their right to sue on behalf of and as representing such registered owners.

On November 27, 1920, an agreement for the sale of the whole of the lands was made between the Mennonite Trustees and John Murphy. The purchase money under this agreement was $4,813,399.50, payable as to $5000 on the execution of the agreement and as to the balance by instalments, the last of which was payable on April 21, 1921.

The provisions of this agreement so far as relevant to the questions arising on these appeals were: (*a*) A covenant by the purchaser to pay the purchase money in the manner set forth in the agreement. (*b*) A covenant by the vendors on payment of all sums payable by the purchaser to cause to be conveyed and assigned to the purchaser the parcels of land comprised in the reserve by a transfer under the Land Titles Act to be prepared by vendors' solicitors. (*c*) A provision that time should be of the essence of the agreement. (*d*) A clause in the words following—namely: " 10. It is further agreed that the purchaser shall have the privilege of paying off the whole or any part of the unpaid purchase price at any time previous to such becoming due, on paying all interest and arrears, if any, to date of such payment, without giving any notice or bonus. The vendors hereby covenant and agree to transfer the said lands to the purchaser forthwith at his (the purchaser's) request, and at his (the purchaser's) option, in parcels of 5120 acres, ... whenever and so often as a sufficient sum of money shall be paid under this agreement to fully cover the purchase price, at $45.50 per acre, of the said parcel or parcels of land so requested to be transferred and to leave thereafter a reserve fund in the hands of the vendors of $25,000.00."

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The deposit of $5000 was the only sum paid under this agreement, and on March 1, 1921, default had been made in payment of instalments amounting to more than $500,000. In the month of March, Mr. Geddie, of Geddie McKay, Ld., was negotiating with J. J. Logan and J. F. Taylor to finance the purchase of the reserve, and they agreed to form a company to take over Murphy's contract with certain modifications.

On April 1, 1921, the Mennonite Trustees, as a result of discussions with Logan, submitted an offer to amend the terms of Murphy's contract.

The material alterations were as follows: "1. To reduce the purchase price of the lands therein described to 44 dollars an acre. 2. To alter the terms of payment to read in effect as follows: (*a*) 5000 dollars cash, the receipt whereof is acknowledged. (*b*) The sum of 1,000,000 dollars immediately upon the deposit with the trustee hereafter referred to, of transfers of at least 90 per cent. of the said reserve computed on the basis of the lands set out in the agreement of November 27, 1920. (*c*) The sum of 1,000,000 dollars on November 1, 1921. (*d*) The sum of 1,000,000 dollars on the first day of April, A.D. 1922. (*e*) The balance of the said purchase price on the first day of July, A.D. 1922. 3. Nothing herein contained to affect the term of the agreement of November 27, 1920, as to the transfer of the parcels of 5120 acres as therein specified. 4. That the Saskatchewan Mortgage and Trust Corporation, Ld., be appointed as trustee to accept the transfers referred to above, and to perform such other duties as may be required of it by the terms of a trust agreement, its fees and charges to be paid share and share alike."

On April 2, 1921, the agreement to which reference has already been made was entered into—that is to say, an agreement under seal between the Mennonite Trustees and Geddie McKay, Ld.—whereby the Mennonite Trustees, both as trustees and in their individual capacity, acknowledged and declared that Geddie McKay, Ld., was entitled to payment of its commission of $423,156 in securing John Murphy as purchaser of the reserve. Apparently this acknowledgment

was given in anticipation of the acceptance of the offer of April 1, and of the formation of a company to take over Murphy's contract. The offer of April 1, 1921, was accepted by letter dated April 9, and on April 22, 1921, the solicitor for John Murphy called upon the Mennonite Trustees under the modified agreement to transfer to the Trust Company as trustee two parcels of land each containing 5120 acres.

On May 2, 1921, the Sales Company was incorporated, and by an assignment bearing date May 13, 1921, John Murphy assigned to the Sales Company the agreement for sale of November 27, 1920, as amended by the accepted offer of April 1, 1921, and all his right, title and interest thereunder.

On May 12, 1921, an agreement (hereinafter referred to as "the trust agreement") was made between the Mennonite Trustees (thereafter called "the vendors") of the first part, the Sales Company (thereafter called "the assignee") of the second part, and the Trust Company (thereafter called "the trustee") of the third part, whereby, after reciting the dealings hereinbefore referred to, including the assignment to the Sales Company, it was agreed as follows—namely: "(*a*) That the trustee shall receive from the vendors or their solicitors, and hold the transfers of the lands of the members of the said Mennonite colony and shall deliver them to the assignee in accordance with the terms of the said agreement for sale dated November 27, 1920, and the said accepted offer dated April 1, 1921. (*b*) That the said trustee shall receive and hold bills of sale of such of the said personal property as is required to be transferred by the said agreement for sale dated November 27, 1920, and more particularly described in the book of the Mennonite association as of date October 28, 1920, and shall release to the assignee the personal property or equipment belonging to each portion of property for which the assignee calls for the title and to which the assignee may be entitled to title according to the terms of the said agreement for sale, dated November 27, 1920, and the said accepted offer dated April 1, 1921. (*c*) That the trustee shall pay to the said Geddie McKay, Ld., or demand out of the money received under the said agreement for sale, dated November 27,

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1920, and the said accepted offer, its said commission, and being the sum of $423,156.00. A written receipt shall be taken by the trustee from the said Geddie McKay, Ld., for any and all moneys paid them on the said commission, and such receipt shall be treated as cash in all settlements between the trustee and the vendors."

On May 17, 1921, the solicitors for the Mennonite Trustees handed to the Trust Company transfers duly executed in the form prescribed by the Land Titles Act of 90 per cent. of the lands of the Mennonite reserve. The transfers were accompanied by a letter stating that they were to be used only in accordance with the agreement for sale and the trust agreement, and asking the Trust Company to advise the purchasers that the transfers had been deposited and to request the payment of one million dollars as required by the amended agreement for sale.

On May 18 the solicitors for the Mennonite Trustees handed to the Trust Company certain bills of sale of chattels accompanied by a letter stating that they were not to be used in any way until the payments required by the amended agreement had been made, and suggesting that the Trust Company should advise the solicitors before handing over any bills of sale or any transfers of land.

On May 20 a meeting was held at which were present Mr. Casey and Mr. Dawson, solicitors for the Sales Company and for the Trust Company; Mr. McWilliam and Mr. Cathrea, solicitors for the Mennonite Trustees; Mr. Smith, manager of the Trust Company; and J. E. Friesen, one of the trustees. At that meeting McWilliam insisted that, as transfers of 90 per cent. of the land had been deposited with the Trust Company, the sum of $1,000,000 was payable by the Sales Company in accordance with the provisions of the amended contract of sale. Casey disputed the liability of the Sales Company to make this payment on the ground that the obligation to deposit transfers had not been performed, the relative certificates of title not having been deposited with the transfers. On the evening of that day McWilliam and Cathrea handed to Smith, as manager of the Trust Company,

the duplicate certificates of title of the lands comprised in the two parcels of 5120 acres each, at the same time again warning him that the $1,000,000 was due, and that no transfers were to be handed over until that sum was paid in addition to the purchase money of any parcels transferred. During the month of May, 1921, Logan applied to the Loan Company for an advance on security of first mortgages of 10,020 acres, portion of the 10,240 acres, and on May 28, 1921, the directors of the Loan Company agreed to lend $221,750 on that security. Mr. E. L. Taylor, solicitor for the Loan Company, was thereupon instructed to prepare the necessary mortgages, and having prepared them went to Swift Current to complete the transaction, arriving there on May 30. He proceeded to examine in the Land Titles office the titles to the land proposed to be mortgaged, for the purpose of ascertaining whether they were in order and what encumbrances were in existence. Murphy, Geddie, J. F. Taylor and Logan were at Swift Current when E. L. Taylor arrived, and Smith arrived there on May 31, bringing with him the transfers and duplicate certificates of title of these parcels. All the persons named were employed until the evening of June 3 in putting the titles and the transfers and mortgages in order for registration in the Land Titles office, and on that evening all the documents were ready to be lodged for registration. Smith gave McWilliam and Cathrea no information about the work on which he was engaged, and no indication that it was intended to transfer any of the lands, until the evening of Friday, June 3. On that evening he told McWilliam that the transfers of the two parcels of 5120 acres each were to be lodged in the Land Titles office for registration on the next day and that the Sales Company had not paid the instalment of one million dollars and he did not think they intended to pay it. McWilliam then insisted that Smith must obtain payment of the million dollars before transferring any lands, in addition to the purchase money of any land he might transfer.

He obtained, however, no promise from Smith to that effect, and his telephone inquiry next morning at the Land

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Titles office, to which reference will be made later, indicates very clearly that he had no assurance that the transfers would not be made as proposed. But he took no steps either to give notice that the transfers could not properly be used until the $1,000,000 instalment had been paid or to protect the interests of his clients, the Mennonite Trustees, and of the registered owners whom they represented, by lodging in the Land Titles office caveats against the registration of any dealings with the land or otherwise. If caveats had been lodged before the transfers and mortgages were handed in for registration the Loan Company would presumably have refused to advance any money on the security of these lands until they had been withdrawn or removed. The reason assigned by McWilliam for taking no action in the matter was that he 'thought the protection of the vendors was in the trustee."

On the morning of June 4, before going to the Land Titles office, Logan and Taylor, representing the Sales Company, Smith, representing the Trust Company, and Geddie, representing Geddie McKay, Ld., met for the purpose of arranging the method of payment of the purchase money for the 10,240 acres. The total amount of purchase money was $476,440. It was arranged that this should be satisfied by handing to the Trust Company a receipt from Geddie McKay, Ld., for $423,156 (the amount admitted by the agreement of April 2 to be due to that company for commission), by allowing against the purchase money deductions (*a*) in respect of mortgages and other encumbrances on the lands transferred, $12,947.56; (*b*) in respect of alleged shortages in chattels delivered, $11,925.50; and (*c*) in respect of encumbrances to be discharged and other small charges, $1023.97, and that a cheque for the balance should be handed to Smith, representing the Trust Company. Pursuant to this arrangement a cheque for $28,410.95 was handed to Smith before the transfers were deposited at the Land Titles office. It does not appear why the cheque was drawn for this amount, the sum to be paid on the basis of the arrangement being $27,386.97.

After this transaction had been completed, E. L. Taylor, Smith and Logan met by appointment at the door of the

Land Titles office a little before 10 o'clock on the morning of June 4. As soon as the office opened, Smith and Logan handed in for registration the transfers to the Sales Company with the relative duplicate certificates of title, and E. L. Taylor immediately afterwards handed in for registration the mortgages from the Sales Company to the Loan Company, having been present at the counter while the transfers and certificates were being lodged. Then Logan handed in for registration second mortgages in favour of himself, J. F. Taylor, J. A. Campbell and Geddie McKay, Ld. Before being lodged for registration all these documents had been checked by the staff of the Land Titles office and found to be in order. After lodging the documents the parties went back to their hotel, and E. L. Taylor, on behalf of the Loan Company, handed to Logan and J. F. Taylor, representing the Sales Company, a cheque for $194,472.60, the balance of the agreed loan after deducting payments made by him in discharge of encumbrances and other charges.

Between 11 o'clock and noon on the same day McWilliam inquired by telephone from the Land Titles office whether any transfers of the Mennonite land had been lodged for registration, and was informed that some had been lodged.

On Sunday, June 5, McWilliam learnt that mortgages to the Loan Company of the land covered by the transfers had been lodged for registration.

On Monday, June 6, the statement of claim in the first action was filed, the Mennonite Trustees being plaintiffs and the Trust Company, the Sales Company and John Murphy defendants. The plaintiffs claimed (inter alia) an injunction restraining defendants from dealing with the transfers and the duplicate certificates of title, and an order forbidding the registrar of the Swift Current Land Registration District to register any of the transfers. An order was made on the same day in accordance with these claims.

At this time all the documents lodged for registration had been entered in the receiving book of the Land Titles office in accordance with s. 23 of the Land Titles Act, and some of the documents had been entered in the day book in accordance

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with s. 25, but none had been entered in the register on the folios constituting the existing certificates of title (s. 27). Their Lordships agree with the learned judges of the Court of Appeal in thinking that in these circumstances none of the transfers or mortgages in question were "registered" within the meaning of s. 58 or of s. 195 of the Act.

At the trial of this action by MacDonald J. in October, 1921, after evidence had been taken, the statement of claim was amended by adding the Loan Company, Geddie McKay, Ld., and Messrs. Logan, J. F. Taylor and J. A. Campbell as defendants. The action having come on for further hearing on the amended pleadings, a settlement was arrived at between the plaintiffs and the defendants, Geddie McKay, Ld., and judgment was entered in accordance with the terms of settlement against that defendant. Judgment against the other defendants was entered as follows: 1. Against the Trust Company declaring that it committed a breach of trust in delivering the transfers and duplicate certificates of title to the Sales Company, removing it from its position as trustee, and for accounts. 2. Against all defendants except the Loan Company that the injunction order made on the original statement of claim be made permanent. 3. Against the defendants Logan, J. F. Taylor and Campbell for an injunction restraining them from registering or attempting to register the mortgages given to them. 4. An injunction restraining the registrar from registering any of the transfers or mortgages mentioned in paras. 1 and 3, and an order making permanent the interim injunction granted on the action so far as it related to defendants other than the Loan Company. 5. An order that the mortgages given by the Sales Company to the Loan Company be registered against the lands affected by such mortgages and a direction to the registrar to receive and register such mortgages as if they had been given by the registered owners of the lands instead of by the Sales Company. 6. An order for costs, which need not be set out in detail.

From this judgment appeals were taken to the Court of Appeal for Saskatchewan by the plaintiffs, the Trust Company, and the Sales Company, the result being that the judgment

was varied by setting aside so much as upheld the mortgage to the Loan Company and awarded costs to it; by varying the order as to costs; by declaring that the Loan Company was subrogated to the rights of the mortgagees, encumbrances and lien holders whose mortgages, encumbrances and liens it had paid, and by ordering that nothing in the judgment should be deemed to affect or dispose of the rights of any of the parties to the sum of $28,410.95 in the possession of the Trust Company. The appeal of the Trust Company against the plaintiffs was dismissed and the appeal of the Trust Company against the Loan Company was allowed. The appeal of the Sales Company was dismissed with costs.

The other action—that by the Sales Company against the Mennonite Trustees—was for specific performance of the agreement of November 27, 1920, as varied by the agreement of April, 1921. In this action the defendants counterclaimed for rescission of the contract and a declaration that it was null and void. MacDonald J. dismissed the action for specific performance, and on the counterclaim made a decree nisi for cancellation of the contract, holding that default had been made in the payment of the instalment of a million dollars on the transfers being deposited with the Trust Company. No question has been raised before the Board in respect of the form of this order.

The appeal by the Sales Company from this judgment was dismissed with costs. Against the judgments of the Court of Appeal in these two actions the present appeals are brought, and an order for consolidation of the appeals of the Sales Company in both actions having been made, those appeals and the appeal of the Loan Company in the first action were heard together.

The grounds upon which the decision of the Court of Appeal was based were: (1.) That upon the transfers of 90 per cent. of the lands being deposited with the Trust Company on May 17, 1921, the Sales Company became liable to pay a million dollars as an instalment of the purchase money, and that the Sales Company, being in default in payment of this instalment, was not entitled to insist on the transfers of the

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two parcels of 5120 acres each on payment of the purchase money of such parcels. (2.) That consequently the Trust Company committed a breach of trust, of which the Sales Company had knowledge or notice, in handing over the transfers of these parcels to the Sales Company. (3.) That the purchase money of the parcels transferred to the Sales Company was not effectively paid or satisfied by the transaction of June 4 above referred to. (4.) That in the circumstances the Sales Company, by obtaining delivery to it of the transfers and by lodging them for registration, acquired no right against the registered owners of the lands in question and were not entitled to have such transfers registered. (5.) That the Sales Company, being in default in the performance of its obligations under the agreement, was not entitled to specific performance. (6.) That the Loan Company knew or had notice that the delivery of the transfers to the Sales Company was a breach of trust and was consequently in no better position than the Sales Company. (7.) That the payment by the Loan Company to the Sales Company of the amount advanced was brought about by the carelessness or negligence of the Loan Company and not by any conduct or representation of the Mennonite Trustees, and that consequently there was no ground for postponing the prior interests of the registered owners of the land to the equitable interest claimed by the Loan Company.

The argument on the appeals to this Board was directed to these points, and it will be convenient to deal with them in the order in which they are set out above.

(1.) and (2.) their Lordships agree with the conclusion at which both the Court of Appeal and the trial judge arrived on these points. The amended agreement provides for the payment of a million dollars immediately on the deposit with the trustee of " transfers " of at least 90 per cent. of the lands. The word " transfer " when used in connection with a system of registration of titles to land has generally, if not universally, the meaning ascribed to it by s. 2, sub-s. 20, of the Saskatchewan Land Titles Act, 1917—namely, " The instrument by which one person conveys to another an estate or interest in land

under the Act." It is unquestionably used in that sense in cl. 4 of the agreement of November, 1920, and their Lordships can find nothing in the context of the original or of the modifying agreement which indicates that the word is used in cl. 2 (*b*) of the latter agreement otherwise than in its ordinary and primary meaning. The words of the agreement being, in their Lordships' opinion, unambiguous, there is no occasion to speculate on the objects or motives of the parties, or on the probabilities. The Sales Company was therefore in default on June 4, 1921, and it follows that in handing over on that day the transfers of part of the land sold, the Trust Company committed a breach of trust. The evidence shows clearly that the Sales Company through its agents, Logan and J. F. Taylor, and its solicitors, Casey and Dawson, knew or had notice of all the relevant facts, and that it was a party to the breach of trust committed by the Trust Company.

(3.) On this point their Lordships are unable to agree in the conclusion of the Court of Appeal. That conclusion was based mainly, if not entirely, on the view that Geddie McKay, Ld., had not earned and was not entitled to be paid the commission of $432,156.00, the receipt for which was relied on as constituting an effective payment by the Sales Company to the Trust Company of an equivalent amount of the purchase money. The agreement of April 2, 1921, in their Lordships' opinion, establishes conclusively as against the Mennonite Trustees and their principals, the registered owners of the lands, that Geddie McKay, Ld., was entitled to be paid commission amounting to $423,156.00. This agreement was not put in evidence at the trial and was consequently not before the Court of Appeal. The omission to put it in evidence was apparently due to the fact that at the trial no question was raised as to the right of Geddie McKay, Ld., to commission, the objection to the receipt being treated as payment of part of the purchase money being founded on other grounds. Their Lordships cannot but think that the conclusion of the Court of Appeal that Geddie McKay, Ld., was not in June, 1921, entitled to payment of its commission would not have

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been reached if the agreement of April 2, 1921, had been before that Court. The Trust Company was required by cl. (c) of the Trust Deed to pay the amount of the commission on demand out of the moneys received under the agreement for sale, and it was by the same clause provided that the written receipt of Geddie McKay, Ld., for moneys paid them in respect of commission should be treated as cash in all settlements between the Trust Company and the vendors. The sum of $423,156.00 was in effect paid to Geddie McKay, Ld., out of the purchase money of the 10,240 acres, and the receipt for that sum should therefore be regarded as between the Trust Company and the vendors as evidencing the payment in cash by the Trust Company to Geddie McKay, Ld., of that amount in satisfaction of its admitted claim for commission. The propriety of the allowance by the Trust Company of a deduction in respect of alleged shortages of chattels delivered was also questioned. This objection was not seriously pressed in argument before this Board, and it is sufficient to say that in their Lordships' opinion the Mennonite Trustees and their principals are not entitled, having regard to the terms of the Trust Deed, to complain, as against the purchasers, of the action of the Trust Company, in the absence of proof of any want of bona fides or of anything in the nature of fraud or collusion with the purchasers.

(4.) This point involves the consideration of the position of the transferee under a transfer in due form, executed by the registered owner, but not registered, as against such registered owner. Sect. 58, sub-s. 1, of the Land Titles Act provides that after a certificate of title has been granted no instrument shall, until registered, pass any estate or interest in the land therein comprised . . . . or render such land liable as security for the payment of money, except as against the person making the same. Sect. 59 of the same Act provides that the owner—i.e., the registered owner—of land for which a certificate of title has been granted shall hold the same subject . . . . to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes

such certificate of title absolutely free from all other encumbrances, liens, estate or interests whatsoever, with certain exceptions not material in this case.

The effect of provisions similar to, but not identical with, those quoted, contained in the Real Property Act, 1900, of the State of New South Wales, on the position of the holders of unregistered transfers and subsequent mortgages by the transferees was considered by the High Court of Australia in the case of *Barry* v. *Heider*. (1) In that case the contest was between Barry, the registered owner, and Heider and Gale, holders of successive unregistered mortgages given by one Schmidt, the transferee under an unregistered transfer executed by Barry. The transfer to Schmidt had been set aside at the instance of Barry on the ground that it was obtained by fraud, and the question of the rights of the mortgagees from Schmidt was directly in issue. The provisions of the Saskatchewan Act are in some respects different from those of the New South Wales Act, but for the purpose of the point now under discussion the differences are immaterial. In that case Griffith C.J. said (2): "In my opinion equitable claims and interests in land are recognised by the Real Property Acts. It follows that the transfer of October 19, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognized by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest. It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest."

Applying this statement to the facts of the present case, the effect of the delivery to the Sales Company of transfers in its favour executed by the Mennonite owners was to confer on the Sales Company an equitable claim or right to the land comprised in such transfers, but since that equitable claim or

(1) 19 C. L. R. 197. (2) Ibid. 208.

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right was acquired with notice of the breach of trust committed by the Trust Company, the Sales Company is precluded from relying on its equitable title as against the legal title of the registered owners. Their Lordships are, therefore, of opinion that the Sales Company by obtaining the transfers did not, while such transfers remained unregistered, acquire any estate in or right to the land comprised in the transfers which it could set up against the registered owners of the land.

(5.) Their Lordships have already expressed the opinion that the Sales Company made default in the performance of its obligations under the agreement for sale by failing to pay the instalment of a million dollars. This instalment has ever since remained unpaid, and the Sales Company, being in default under the contract, is not entitled to enforce specific performance.

(6.) Their Lordships are unable to agree with the decision of the Court of Appeal on this point.

The transfers to be regarded are those covering the 10,240 acres of land now in question. It is true that on the face of these transfers it appeared that the purchase money had not been paid at the dates of their execution, and the Loan Company must be taken to have had notice of this fact through its solicitor, E. L. Taylor, who examined the transfers on its behalf. The purchase money remained unpaid up to and including June 3, but on the morning of June 4, before the documents were deposited at the Land Titles office, and before the Loan Company advanced its money, the purchase money of these parcels, with which alone it was concerned, had in fact been paid or satisfied by the transaction before referred to. The registered owners, therefore, were not, when the Loan Company lodged its mortgages and advanced its money, unpaid vendors in respect of these parcels. It is also true that in handing over the transfers before receiving payment of the instalment of a million dollars then payable the Trust Company committed a breach of trust. The Sales Company is precluded from relying on its equitable title under the transfers, because it obtained them with notice of this breach of trust, but the Loan Company is in a different

position. The evidence in the case does not show that either the Loan Company or E. L. Taylor, or any other person through whom the Loan Company might have been affected with notice, knew or ought to have known any facts showing that the Trust Company in handing over the transfers had committed, or that the Sales Company in obtaining them had been party to, a breach of trust. The position of the Loan Company as against the registered owners is therefore not the same as that of the Sales Company—for the latter company had, while the former had not, notice at the time of acquiring its equitable right or claim of the breach of trust committed by the Trust Company.

(7.) Applying the statement quoted above from the report of *Barry* v. *Heider* (1) the executed transfers of these lands operated as a representation to any person into whose hands they might lawfully come without notice of the right of the registered owners to prevent registration of them that the Sales Company—the transferees—were entitled to the interest defined in such transfers and that such interest was assignable provided the purchase money of the land comprised in the transfers had been paid. Before the Loan Company lodged their mortgages for registration or paid over the amount of the loan the purchase money of these lands had in fact been paid. It was not proved that any fact was within E. L. Taylor's knowledge which ought to have put him on inquiry whether the Trust Company was committing a breach of trust in handing over the transfers to the Sales Company in order that they might be registered. The purchase money having been paid, E. L. Taylor was entitled to treat the transfers as a representation that the Sales Company was entitled as against the registered owners to be registered as transferee of an estate in fee simple in the lands comprised in the transfers. Their Lordships can find nothing in the evidence which establishes any carelessness or negligence on the part of E. L. Taylor, who appears to have been the only person concerned in the completion of the transaction on behalf of the Loan Company. On the contrary, he appears

(1) 19 C. L. R. 197, 208.

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to have taken all reasonable precautions in dealing with the matter. On the evidence their Lordships are of opinion that the payment by the Loan Company to the Sales Company of the amount of the loan was induced by the conduct of the registered owners in depositing with the Trust Company executed transfers of these lands and by the conduct of Smith in handing over these transfers to the Sales Company. Smith was the agent of the owners to deal with these transfers, and E. L. Taylor was entitled to assume, in the absence of any indication to the contrary, that he was acting properly in handing them over. Moreover McWilliam and Cathrea, the solicitors for the owners, knew on the night of June 3 that Smith intended to hand over the transfers on the following morning, and that it was intended that they should then be lodged for registration. Having this knowledge, they abstained from giving notice to any person other than Smith of their contention that the transfers could not properly be handed over or registered, or from taking or attempting to take any step by communicating with the registrar or by lodging a caveat or otherwise to prevent the transaction being completed. The inaction of the solicitors at this time with the knowledge they possessed, is directly imputable to their clients, the Mennonite Trustees and the Mennonite owners themselves. It is as if they had all been personally present and had allowed the transaction with the Loan Company to go through without protest or objection. In these circumstances their Lordships are of opinion that the decision of the Court of Appeal on this point cannot be supported, and that MacDonald J. was right in holding that, as against the registered owners, the Loan Company was entitled to the benefit of the mortgages given to it by the Sales Company.

For the above reasons their Lordships will humbly advise His Majesty that the appeal of the Loan Company in the first action be allowed, that the appeals of the Sales Company in both actions be dismissed, and that the judgment of the Court of Appeal be varied as follows: (1.) By discharging so much of the judgment as is contained in the following clauses (*a*), (*b*) 1, (*b*) 2 and (*b*) 3, and (*d*). (2.) By restoring so

much of the judgment of MacDonald J. (1) dated September 8, 1923, as is contained in cl. 5 thereof. (3.) By ordering that the Mennonite Trustees, the plaintiffs in that action, do pay the costs of the Loan Company of the action and of the appeal to the Court of Appeal of Saskatchewan and of this appeal.

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There will be no order as to the costs of the Trust Company or of the Sales Company of this appeal. The Sales Company will pay the costs of the appeal in the second action.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

[HOUSE OF LORDS.]

SWAN . . . . . APPELLANT;

AND

SINCLAIR . . . . . RESPONDENT.

H. L. (E.)* 1924 *Nov.* 21.

Easement — Right of Way — Express Grant — Non-user — Acquiescence in Obstructions to Way—Abandonment.

In 1870 a row of houses was put up for sale by auction in eleven lots. One of the conditions was that a strip of land 15 feet in width, running the entire length of the lots and being the rear portions of the back gardens of the houses, was intended to form a right of way from the back garden of each house into Church Road, which bounded the side of lot 1 on the south, and that the lots would be sold subject to and with the benefit of such right of way, and that the respective purchasers should at the earliest possible moment remove the 15 feet of end garden wall and form the said right of way. This condition was recited in each of the conveyances. Lot 1 was conveyed subject to the right of way of the owners of the other lots and lots 2 and 3 with the benefit of and subject to the said right of way. The purchaser of lot 1 let it for a term of fifty years (which expired on June 25, 1922) subject to the right of way. In 1904 the plaintiff took an assignment of this lease, and in 1911

(1) See p. 218.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD CARSON.

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he purchased the fee simple of lots 2 and 3, with the benefit and subject to the right of way. The defendant was the present owner of lot 1. For fifty years from the date of the original sale no attempt was made to form the proposed roadway, the garden walls dividing the several lots remained intact, and the wall separating lot 1 from Church Road was not breached. Church Road was 6 feet above the level of the back gardens. In 1883 the original lessee of lot 1 in the course of erecting some stables in his back garden raised the surface of the strip of land at the end of his lot to the level of Church Road, with the result that there was a drop of 6 feet from that strip into lot 2. In 1919 the plaintiff, in anticipation of the expiration of his lease, proposed to build a garage on lots 2 and 3. With that object in view he pulled down part of the wall which separated the rear portion of lot 1 from Church Road and erected gates there, and he also raised the level of the rear portion of lot 2; and subsequently he caused a car to be driven through the gates over the strip in lot 1 into lot 2. On the expiration of the lease the defendant blocked up the gates and obstructed the way. In an action by the plaintiff as owner of lots 2 and 3 to enforce his right of way against the defendant:—

Held, that until the land was cleared there could be no effectual creation of a right of way, and that, having regard to the time which had elapsed before any purchaser attempted to assert his rights under the original conveyance, the inevitable inference was that the arrangement made in 1870 had been abandoned by common consent.

Order of the Court of Appeal [1924] 1 Ch. 254 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Lawrence J.

The action was brought by the appellant against the respondent for a declaration that the appellant and his tenants, owners and occupiers of Nos. 320 and 322 Essex Road, Islington (hereinafter referred to as lots 2 and 3), were entitled to a general right of way over a strip of land of the width of 15 feet at the rear of the hereditaments known as 314A, 316 and 318 Essex Road, belonging to the respondent (hereinafter referred to as lot 1), from and to Church Road, Islington, and for an injunction to restrain obstruction of the said right of way and an order upon the respondent to pull down and remove the wall built by her across the said strip of land, and for damages. Lawrence J. gave judgment in favour of the respondent and his decision was affirmed by the Court of Appeal by a majority (Warrington and Sargant L.JJ.; the Master of the Rolls dissenting).

(1) [1924] 1 Ch. 254.

The facts are fully stated in the report of the case before the Court of Appeal and also in the judgment of the Lord Chancellor, and they are summarized in the headnote.

1924. Oct. 27, 28, 30. *Jenkins K.C.* (with him *J. E. Harman*) for the appellant. A right of way lying in grant is a right of property of which the owner cannot be deprived in any other way than in the case of other property. A legal right is not capable of extinguishment merely by conduct on the part of the owner, unless somebody has altered his position on the faith of that conduct. Here there is no evidence of abandonment except non-user, and non-user is not in itself a proof of abandonment: Gale on Easements, 8th ed., p. 527; *Moore* v. *Rawson* (1); *Reg.* v. *Chorley* (2); *Ward* v. *Ward* (3); *Stokoe* v. *Singers* (4); *Crossley & Sons* v. *Lightowler* (5); *Cook* v. *Bath Corporation* (6); and see *Ramsden* v. *Dyson*. (7) The fact that the right of way is referred to in every conveyance and lease of the appellant's and respondent's premises since the date of the original conveyances in 1871 negatives any intention of abandonment.

Owen Thompson K.C. (with him *R. M. Pattisson*) for the respondent. 1. At the date of the grant there was no subsisting and practicable right of way, and the cases cited by the appellant are distinguishable on that ground. 2. If otherwise, mere non-user may be evidence of abandonment of a right of way, whether created by express grant or not. At the date of the original conveyances there existed a series of garden walls along the boundaries of the several properties and a wall separating the properties from the road to which the right of way was to give access, and there could be no open way until the removal of these obstructions. But for fifty years nothing was done. The acquiescence in the continued existence of these obstructions over a great number of years affords a sufficient ground for inferring abandonment. A

(1) (1824) 3 B. & C. 332.
(2) (1848) 12 Q. B. 515, 519.
(3) (1852) 7 Ex. 838, 839.
(4) (1857) 8 E. & B. 31, 37, 38.
(5) (1866) L. R. 3 Eq. 279, 292; (1867) L. R. 2 Ch. 478, 482.
(6) (1868) L. R. 6 Eq. 177, 179.
(7) (1866) L. R. 1 H. L. 129, 140–1.

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right of way may be lost by an unexplained non-user over a long period of years. It is not necessary that the owner of the servient tenement should have altered his position on the faith of the conduct of the owner of the right of way, though that is an element to be considered. The acquisition of rights by other parties is an important element and is material as shortening the time required for abandonment, but the respondent denies that in no circumstances can an unexplained non-user amount to an abandonment without that element. The law as to abandonment may be thus illustrated. A. Assume that my neighbour grants me a right of way over his garden through a gate in his garden; I do not lose my right of way if the gate is open. B. Then suppose my neighbour locks the gate and I do nothing for a long period, say twenty years; I lose my right. C. Suppose my neighbour has a wall between my garden and his and grants me a right of way and covenants to pull down the wall and make a gate, and nothing is done for fifty years; my acquiescence is evidence of abandonment, and I lose my right. As to the authorities. *Doe* v. *Hilder* (1) and *Moore* v. *Rawson* (2) show that the release of a right of way may be presumed in the same way as a grant and that the right may be lost by non-user over a long period. In *Bower* v. *Hill* (3) Tindal C.J. says that a long continued acquiescence by the plaintiff in an obstruction to his right of way may be evidence of abandonment. *Reg.* v. *Chorley* (4) shows that the true effect of the acquisition of rights by third parties as a consequence of the plaintiff's conduct is to shorten the period required for abandonment. In *Crossley & Sons* v. *Lightowler* (5) Lord Chelmsford treats the question of abandonment as one of intention to be decided on the facts of each particular case. *Stokoe* v. *Singers* (6), in point of decision, does not hurt the respondent, but some of the interlocutory dicta go further than is necessary: see Gale on Easements, 8th ed., pp. 525, 527. *Cook* v. *Bath*

(1) (1819) 2 B. & Al. 782, 791.
(2) 3 B. & C. 332, 339.
(3) (1835) 1 Bing. N.C. 549, 555.
(4) 12 Q. B. 515, 519.
(5) L. R. 2 Ch. 478, 482.
(6) 8 E. & B. 31, 37, 38.

Corporation (1) merely shows that it is a question of fact whether the plaintiff's conduct amounts to an abandonment; but the statement of the law by Malins V.-C. cannot be accepted in its entirety.

Jenkins K.C. replied.

[On the question whether the purchaser of one lot was entitled to enforce his rights under his conveyance against the purchaser of another lot the following cases were referred to: *Elliston* v. *Reacher* (2); *Spicer* v. *Martin* (3); *Knight* v. *Simmonds*. (4)]

The House took time for consideration.

1924. Nov. 21. VISCOUNT CAVE L.C. My Lords, this is an appeal by the plaintiff in the action from an order of the Court of Appeal confirming a judgment of Lawrence J. in favour of the defendant, and raises questions relating to an alleged right of way.

In the year 1870 two persons named Dyson and Parker were the owners of a block of land on the east side of Essex Road, Islington, and having a return frontage to Church Road; and on this block of land there stood twelve houses known as Nos. 316 to 338 (even numbers, inclusive) Essex Road. Each of these houses faced towards Essex Road and had a garden running back to a wall which formed the eastern boundary of the property and divided by cross walls from the gardens on each side.

On October 27, 1870, the owners put the property up for sale by auction in eleven lots; lot 1 (which was the southernmost lot and included the return frontage on Church Road) consisting of Nos. 316 and 318 Essex Road, lot 2 consisting of No. 320, lot 3 of No. 322, and so on up to lot 11, which consisted of the northernmost house known as No. 338 Essex Road. No copy of the conditions of sale is available, but from the recital contained in the conveyances of lots 1, 2 and 3 (to be hereafter referred to) it appears that one of the conditions

(1) L. R. 6 Eq. 177, 179.
(2) [1908] 2 Ch. 374, 384.
(3) (1888) 14 App. Cas. 12.
(4) [1896] 2 Ch. 294, 297.

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provided for setting aside along the eastern boundary of the land a strip 15 feet wide running north and south, which was to give the occupier of each lot a back way for carriages from and into Church Road; and it is with reference to the right of the owner of lots 2 and 3 to use this back way over the rear of lot 1 that the present dispute arises.

Lot 2 at the sale (No. 320 Essex Road) was sold to one James Frederick Corben, and the conveyance to him, dated February 2, 1871, contained the following recital, which it is desirable to set out in full: "And whereas the said William Dyson and James Parker in exercise of the said power of sale contained in the hereinbefore recited will and with the assent of the said Daniel Thomas Sharp and Peter Borgnis caused the messuage being Number 320 Essex Road hereinafter described and intended to be hereby conveyed with other messuages and premises known as Numbers 316, 318, 322, 324, 326, 328, 330, 332, 334, 336 and 338 in Essex Road aforesaid comprised in and assured by the said recited indenture of the 7th day of July 1854 to be put up to sale by public auction by Messrs. Newbon & Harding at the Auction Mart Tokenhouse Yard in the City of London on the 27th day of October 1870 in 11 lots, and it was amongst others a condition of the said sale that the part coloured brown on the plan drawn in the margin of these presents was intended to form a right of way from the back gardens of each house into the Church Road and that the lots would be sold subject to and with the benefit of such right of way and that the piece of ground marked brown on the said plan of the width of 15 feet at the rear or bottom of the back gardens of each lot 1 to 10 inclusive would be included in the purchase of each of those lots but subject to a right of carriage way to the owners of lot 11 and each of the other lots through and over the same into the Church Road but such right of way would only belong to the respective purchasers on the determination of the existing tenancies and for that purpose each purchaser (except the purchaser of lot 3 which was vacant) would have to determine at the earliest possible period the tenancy of the lot purchased by him and that the respective purchasers were

on the completion of their respective purchases to forthwith at the earliest possible period consistent with the determination of the existing tenancies remove the 15 feet of end garden wall and form the before mentioned right of way. . . . ." The deed then contained a conveyance of No. 320 Essex Road " together with such right of carriage way into and over the pieces of ground marked brown at the rear of the premises lot 1 on the said plan into Church Road as in the said conditions mentioned " to James Frederick Corben in fee simple " subject nevertheless as to the part thereof coloured brown on the said plan to a right of way for the owners of the messuages and premises Numbers 322, 324, 326, 328, 330, 332, 334, 336 and 338 Essex Road aforesaid as in the said conditions of sale mentioned."

Lot 3 at the sale (No. 322 Essex Road) was sold to John Edwin Corben and was conveyed to him by an indenture also dated February 2, 1871. This deed was in like form as to recitals and otherwise with the above-mentioned conveyance of No. 320.

Lot 1 at the sale (Nos. 316 and 318 Essex Road) was sold to James Jay, and was conveyed to him by an indenture dated February 3, 1871. This deed contained a recital of the condition identical with that contained in the conveyances of lots 2 and 3 and conveyed the property to the purchaser in fee simple " subject as hereinbefore mentioned or referred to " ; but as this lot abutted on Church Road and was intended to become a servient tenement only and not a dominant tenement in respect of the strip of land 15 feet wide, there was, of course, no grant to this purchaser of any right of way.

The conveyances of the other lots (4 to 11) are not in evidence, but it may be presumed that they were in like form with the conveyances of lots 2 and 3.

All the tenancies of the several lots expired within a year and a half after the sale.

The subsequent history, so far as the paper title is concerned, of lots 2 and 3 was as follows. On April 12, 1871, lot 2 was conveyed by James Frederick Corben to John

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Edwin Corben in fee simple with and subject to the right of way mentioned in the above conveyance of February 2, 1871. On May 19, 1909, John Edwin Corben leased lot 3, except the strip of land 15 feet wide at the rear thereof, but together with a right of way over that strip, to Davis and Greenland for three years, the lessees covenanting on being required to do so by the lessor to wall off the strip of land from the garden and make and form a roadway upon it. On August 11, 1911, John Edwin Corben having died, his executrix conveyed lots 2 and 3 to the appellant, George Swan, in fee simple with and subject to the right of way.

The history so far as title is concerned of lot 1 was as follows. On October 21, 1873, James Jay leased that lot, subject to the right of way to the owners and occupiers of lots 2 to 11, to William George Swan (the father of the appellant) for fifty years from June 24, 1872, the lessee covenanting to keep the site of the roadway on the demised land in good repair and, if required, to pay a fair proportion with the owners and tenants of the other lots using the roadway towards keeping it in good repair and towards erecting and maintaining gates at the entrance from Church Road, and also covenanting that the roadway should be used as a private roadway only for the owners and occupiers of Nos. 320 to 338 Essex Road. On July 25, 1904, William George Swan having died, his executors assigned this lease to the appellant. James Jay died in July, 1895, having devised the freehold of lot 1 to the respondent.

Notwithstanding the elaborate provisions contained in the deeds of 1871 for the formation and use of the proposed roadway at the rear of Nos. 316 to 338 Essex Road, no such roadway was in fact (until the appellant's proceedings in the year 1922 to be hereafter mentioned) either formed or used, nor is there any evidence that any person interested in any of the several lots ever desired or requested that it should be formed or made any attempt to use it as a means of access to his premises. The walls dividing the several lots, including those parts of them which ran across the 15 feet strip to the eastern boundary of the land, remained intact, and in places

where they fell down were rebuilt or replaced by fences. The wall dividing the southern end of the proposed roadway from Church Road was not breached; and although the level of the 15 feet strip which it had been proposed to form into a roadway was 6 feet below the level of Church Road, no attempt was made to form a gradient by which carriages could have passed into or from Church Road. As to the reason why all the purchasers of the eleven lots so refrained from action there is no evidence. It may be conjectured that having regard to the small size of the houses and the existence of sufficient access from Essex Road they were unwilling to incur trouble and expense in bringing all the purchasers into line, getting the road formed, made up and graded, and erecting new walls or fences for the protection of their gardens, and accordingly preferred to keep the strips of land which would have been required for the road in their own undisturbed possession and enjoyment. But however that may be, the fact is, that from the year 1871 until the year 1922, that is to say, for a period exceeding fifty years, the road remained unformed and unused.

There is one other circumstance to be mentioned. In the year 1883 the appellant's father, W. G. Swan, the lessee of lot 1, erected some stabling upon a part of that lot adjoining the site of the proposed roadway; and in the course of so doing he deposited a quantity of soil taken from the excavation made for the stables on the site of the roadway where it crossed the premises demised to him, and so raised the surface of that strip of land to the level of Church Road. No attempt was then made to level or grade the strip or to open a gate from it into Church Road; and the effect of this proceeding was to fill up the space between the northern and southern walls of lot 1 where they ran across the 15 feet strip, so that there was a drop of 6 feet from that strip into lot 2 and the wall between lots 1 and 2 at the rear became a retaining wall instead of a dividing wall. At some later date, probably about 1918 or 1919, the appellant, the owner of lot 2, put a row of stakes into the ground on his side of this retaining wall, close together, and to a height above the top of that

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wall about 18 inches, as a means of preventing accidents, having regard to the drop. It may be mentioned, though little (if anything) turns upon it, that at or about the same date the appellant deposited a quantity of sand, which had been used in protecting the premises from damage by enemy aircraft, on the strip of land at the back of lot 2.

It remains to state the circumstances giving rise to this action. In the year 1919 the appellant proposed to build a new garage on the rear parts of lots 2 and 3 and deposited plans for that purpose. These plans showed the proposed garage as to be built right across the strip of land 15 feet wide at the back of the appellant's premises in such a manner as to block any possibility of the strip being used as a roadway by the occupiers of the premises to the north of it. For some reason the appellant did not proceed with the building at that time ; but he appears to have adhered to his intention of building a garage, for on June 14, 1922, ten days before the expiration of his lease of lot 1, he made a breach in the wall separating that lot from Church Road and erected gates there, and caused a car to be driven through those gates and over the strip of land on lot 1 into lot 2. This was obviously done, not with any desire to conform with the covenant contained in his lease, but with a view to asserting a right of way from Church Road into lot 2, of which he was the owner. On the termination of the lease of lot 1 the respondent, having entered as the reversioner on that lot, blocked up the gates opened by the appellant into that lot and erected a wall across the strip of land on the boundary of lots 1 and 2, so preventing any attempt to exercise any right of way over the strip of land. Thereupon the appellant commenced this action to establish his right of way.

The action was heard by Lawrence J., who held that, having regard to the fact that the roadway over which the right of way was claimed had never been formed or used and the fences had remained as in 1871, and having regard also to the filling up of the strip on lot 1 by the tenant of that lot, he must infer an abandonment of the right of way long before 1922, and he accordingly dismissed the action. The plaintiff having

appealed to the Court of Appeal, that Court by a majority (Warrington and Sargant L.JJ.; the Master of the Rolls dissenting) affirmed the judgment of Lawrence J., and thereupon the present appeal was brought.

My Lords, I do not doubt that Lawrence J. and the Court of Appeal came to the right conclusion. Even if the right of way claimed had been effectively granted to the appellant's predecessors in title in the year 1871, the non-user of the way for upwards of fifty years, coupled with the fact that throughout that time the appellant and his predecessors acquiesced in the continuance of the walls running right across the proposed roadway and (since 1883) in the additional obstruction caused by the filling up of the strip of land on lot 1, would, according to the decisions in *Moore* v. *Rawson* (1); *Bower* v. *Hill* (2); and *Reg.* v. *Chorley* (3), have been good ground for inferring a release or abandonment of the easement. But the present case is not of that simple character. The conveyances of lots 2 and 3 do not contain a clean grant of the right of way claimed, but only a grant of such right of way as was mentioned in the conditions of sale; and in the same way, lot 1 was granted subject, not to a right of way, but to the provisions of the conditions of sale. There was no covenant by the several purchasers with the vendors to pull down the walls and form a roadway, nor was there any deed of mutual covenants entered into between the several purchasers. The effect of the transactions was at the most to create a contractual relation between the several purchasers and the vendors, under which the purchasers might perhaps have been called upon within a reasonable time after the execution of the conveyances and the determination of the existing tenancies, to clear the land and form the road; but until that had been done there could be no effectual creation of the easement of passage. In these circumstances it appears to me that the lapse of time is fatal to the appellant's claim. For the period of fifty years or thereabouts no person sought to enforce the contract, if contract there was, or to enter upon the enjoyment

(1) 3 B. & C. 332. (2) 1 Bing. N. C. 549.
(3) 12 Q. B. 515.

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of the easement; and this being so, it appears to me that it must inevitably be inferred that the arrangement made in 1871 has by common consent been released or abandoned and cannot now be revived. The fact that in the lease of lot 3 in 1909 and the conveyance of lots 2 and 3 in 1911, the right of way is referred to as still existing does not appear to me to militate against the above conclusion. In each of those cases, as Sargant L.J. pointed out, the transaction was solely between persons interested in the particular tenement in question, and according to the ordinary practice of conveyancing, a reference would be made to any right of way which might be found upon the paper title. Further, these deeds were executed upwards of thirty years after the agreement to grant the right of way, and therefore at a period when the right must be deemed to have been already abandoned.

For these reasons I am of opinion that the decision of Lawrence J. and the Court of Appeal was right, and accordingly that this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY. My Lords, the action in this case was brought to obtain a declaration of an alleged right of way in favour of the plaintiff (the appellant) as owner of two plots of land over a plot belonging to the defendant (respondent). The plaintiff's plots are lots 2 and 3 on the plan No. 1 annexed to the appendix, and the defendant's plot is lot No. 1 (Nos. 316 and 318) on the same plan. The right of way is claimed over land coloured brown on the plan at the back of the defendant's plots, and would give access to Church Road. Church Road runs into Essex Road, Islington, nearly at right angles, and all these lots are situate in the angle between this road and Essex Road, on which latter they front.

The case came before Lawrence J. in the first instance. He decided in favour of the defendant on the ground that there had been an abandonment by the plaintiff of the right of way alleged. His decision was affirmed by the majority of the Court of Appeal (Warrington L.J. and Sargant L.J.; the Master of the Rolls dissenting).

Both the plaintiff's and the defendant's tenements form part of a piece of property which was sold by auction in 1871 in eleven lots, all of which are shown on the plan to which I have already referred. There were separate conveyances of the different lots. One of the conditions at this sale by auction was that the part coloured brown on the plan was intended to form a right of way from the back gardens of the houses into Church Road and that the lots were to be sold subject to a right of carriage way in the owners of each of the lots to Church Road over the intervening lots. It was further provided in the conditions that the respective purchasers should with all possible despatch form the right of way and remove all the existing fences dividing up the strip coloured brown on the plan. Each of the conveyances contained a grant of the right of way into Church Road as in the conditions mentioned. The conveyances were executed in 1871, but nothing was done to make the roadway on the land coloured brown, and the exercise of the right of way was totally impracticable, as none of the fences between the different lots were removed, and the wall separating lot 1 from Church Road made access to that road impossible. This state of things continued to exist from 1871 down to 1918. In 1918 the plaintiff was lessee of the defendant's premises under a fifty years' lease expiring in 1922, which had been assigned to the plaintiff on July 25, 1904, and between these dates, from 1904 to 1922, the plaintiff was in possession of the premises, lot 1, now the defendant's, as well as of his own lots 2 and 3. At the end of 1918 or the beginning of 1919 the plaintiff raised the level of the 15 feet strip at the back of the premises, of which he was lessee, so as to correspond with the level of the strip at the back of lots 2 and 3 on the plan.

In 1919 the plaintiff appears to have conceived the idea of erecting a garage upon lot No. 2 and of forming a carriage road which would give communication between the garage and Church Road. He proposed to do this by an exercise of the right of way supposed to have been granted by the conveyance

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in 1871, and which he conceived would be available for him when his lease of lot No. 1 should determine in June, 1922. He demolished the wall between lot No. 1 and Church Road and put up a gate opening on Church Road. The defendant in her turn erected a wall across the strip over which the right of way was claimed, and this action was brought on October 20, 1921, to have a declaration in favour of the plaintiff of the right of way.

In both the Courts below the case was dealt with on the footing that a right of way had been created as an incorporeal hereditament by the various conveyances in conformity with the scheme under the condition at the auction. Both Courts held (the Master of the Rolls dissenting) that this right of way had been abandoned and thereby extinguished. I do not desire to throw any doubt upon the correctness of this view, but it is not necessary to consider it, inasmuch as early in the argument in your Lordships' House it became apparent that no right of way had, in fact, ever come into existence. The scheme contemplated that it should come into existence when the road at the back of the premises had been made and the other provisions of the conditions had been complied with. As this never took place, the right of way remained a mere possibility of the future. After so great a lapse of time it would be impossible for the owners of any of these lots to assert as against the owners of other lots a right to have the scheme carried out by making the road and keeping it open for traffic, as had been intended. A period of fifty years had run before the attempt in 1922 to assert the right by the owner of lots 2 and 3 as against lot 1. I assume for this purpose, without deciding the point, that if sufficiently prompt action had been taken the purchaser of any one lot might have asserted in some form of proceeding as against the owners of the other lots a right to have the scheme, including the road, carried out. But more than twenty years had elapsed before unity of possession was established in 1904, and all right of action was gone, even if any such proceedings could be regarded as proceedings to enforce a contract under seal. Right of way there was none. There was at the outside

merely a contract that certain things should be done and that then there should be a right of way.

In the present case the right is claimed merely by the owner of lots 2 and 3. Questions might arise whether if the scheme for the road and right of way were to be carried out, it would not be necessary that it should be carried out as a whole, but this it is unnecessary to consider.

This claim seems to me to be now quite incapable of enforcement, and the only rational conclusion is that it has been abandoned by common consent for many years.

In my opinion the appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I concur; and I can express my views in a few words.

There is at the back of each of a row of houses in Essex Road, Islington, certain vacant ground, and in the year 1871 these houses with the background to each were exposed for sale under certain conditions. These clearly show that the intention was that a strip of ground was to be formed by dedicating 15 feet in breadth of each back plot so as to form a continuous way in the nature of a blind alley, giving access from Church Road to the back land of each house. This intention was expressed in the conditions of sale, and these conditions of sale were imported by reference and narrative into, it may be assumed, the conveyances of all the plots.

So far as the title deeds are concerned, important questions might have arisen between the respective owners. Speaking generally (except with regard to the end plot) each tenement purported to become servient to the others further away from Church Road and to become dominant to the others nearer to Church Road in the easement of a right of way over the 15 feet strips as described. A question that might naturally have arisen was whether such purported rights and obligations conferred and imposed by the common author did among the grantees inter se involve such mutuality of right and obligation as could be enforced by law. For it is to be observed that the right purported to be created was not in an existing right of way over solum which was accessible, but

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only in a right of way which could be used if existing obstructions were removed and the solum to the breadth designed had been lifted about six feet or thereby in height, so as to enable access to be given on, or approximately on, the level of Church Road, which would be the exit of the alley. But in view of these facts coupled with the non-user afterwards mentioned, it is unnecessary to enter upon such questions as might have arisen on the title as such. Agreeing with your Lordships who have preceded me, I am clearly of opinion that it is now too late to attempt to maintain such a right.

The deed of conveyance of 1871, Sharp to J. E. Corben, may be presumed to afford an example of the conveyances of all the lots ; it refers to the conditions of sale, to the intention to form a right of way from the back garden of each house into Church Road, and that the lot would be sold subject to and with the benefit of such right of way as I have indicated. The important clause is thus narrated. " The respective purchasers were on the completion of their respective purchases to forthwith or at the earliest possible period consistent with the determination of the existing tenancy remove the 15 feet of end garden wall and form the before mentioned right of way," and the grant is made of the parcel of ground with the messuage or tenement thereon, " together with such right of carriage way into and over the piece of ground marked brown at the rear of the premises lot 1 on the said plan into Church Road as in the said conditions mentioned."

I am of opinion that these conveyances did not purport to create de plano the incorporeal hereditament of an easement. The conveyances in my view contain a grant sub conditione. That condition was suspensive and of a twofold character. In the first place, the various division walls and fences which would have been obstructive to the right of way would have to be removed ; in the second place, the level of the roadway would have to be filled up as described. Until these things were done, no usable road could come into existence.

But, further, it is most important to observe that each owner became bound in the year 1871 at the expiry of the existing leases of the ground—and they all expired in a year

or two thereafter—to purify (1) the twofold condition that I have described, and they were under obligation to remove the fences and raise the land. The grant having thus been made both sub conditione and sub obligatione, that condition was, to speak of the period of over fifty years—namely, from 1871 to 1922—never purified; and that obligation was never fulfilled. The right to compel its fulfilment after such a long lapse of time in order to create the physical basis and conditions of what after such creation would then, and not till then, become an incorporeal hereditament, seems to me to have been long lost, and whether founded on contract or on covenant, to be incapable after such a lapse of time of enforcement.

The case is not one, I repeat, of the exercise of a right, the physical conditions of which are in existence so as to enable the right to be exercised. All the arguments as to non-use of a subject which is res mere facultatis can find no place in the present case. For there was no res, no right, and the physical basis of the right, including the very construction of the road over which the right of way was to run, has never yet been in existence.

On that simple ground, I think that the judgment of Lawrence J. and the majority of the learned judges of the Court of Appeal should be affirmed.

LORD WRENBURY (read by LORD CARSON). My Lords, if in 1871, when the conveyances were executed, the grant to each purchaser had been a grant of a right of carriage way to be enjoyed in presenti over a strip of land over which it was physically possible for a carriage to pass, a question would have arisen which is not the question in this case. In that supposed case the question might have been whether non-user for fifty years was evidence of abandonment of an incorporeal hereditament created by deed. The material inquiry would have been whether the grantee of the right had in that state of facts the intention to renounce the right. The facts here are that the grant to each purchaser was a grant of

(1) [A civilian term, see Oxford Eng. Dict. *s.v.*—F. P.]

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a right of carriage way to be enjoyed in futuro over a strip of land upon which work had to be done before a carriage could pass over it. There were existing tenancies of the several plots over which the servitude was to be created, and until their expiration the vendor could not give the right of way in question. There were dividing walls across the brown strip between each two lots—there was a wall at the exit into Church Road—and the level of the brown strip was six feet below the level of Church Road. Until the tenancies expired, until the obstructions above mentioned were removed, and until the gradient up to Church Road had been provided, there could be no carriage way such as was the subject of the grant. In other words, it was a condition precedent to the existence of the way that something should first be done affirmatively. There is, for the present purpose, an important difference between an obligation to do something affirmatively and an obligation to suffer something passively. The latter is a mere servitude. The former is not. The question here is whether acquiescence for fifty years in something not being done which there was, as I will assume, a contractual obligation to do, is an abandonment of the right to require that it be done. This question is more easy than the supposed case above stated.

The frame of the deed upon which the question arises is peculiar. It does not by any express words create an obligation in the purchasers to do the works necessary to be done before the defined carriage way can exist. The deed in favour of the plaintiff's predecessor in title recites, and the deeds in favour of the purchasers of the other lots in like manner recited, conditions of sale, which included a condition that the part coloured brown on the plan was intended to form a right of way from the back garden of each house into the Church Road and that the lots would be sold subject to and with the benefit of such right of way, and that the brown land would be included in the purchase of each lot, but subject to a right of carriage way to the owner of each lot through and over the same into Church Road. And the purchasers were forthwith at the earliest possible moment consistent with the existing

tenancies to remove 15 feet of each garden wall and form the before mentioned right of way. So far this was recital only. Each purchaser's deed then granted a right of carriage way over the brown land into Church Road "as in the said conditions mentioned," and the habendum is to have and to hold (subject as to the brown land to a right of way for the owners of the other lots as "in the said conditions of sale mentioned") to the purchaser. It is unnecessary to consider whether and how one purchaser could as against another purchaser have compelled the performance of the works necessary to create the right of way. I will assume that upon the principle of *Spicer* v. *Martin* (1) the purchaser of one lot could successfully have asserted that this was a scheme whose provisions he could enforce. Assuming this, the case is one not of non-user of a right, but a case of acquiescence in the non-performance of acts (which I am assuming are obligatory) necessary to be done before the right can possibly be exercisable. In that state of things the doctrine of non-user to be found in such cases as *Ward* v. *Ward* (2); *Crossley & Sons* v. *Lightowler* (3), and the other like cases which have been cited is not applicable. The facts here are that neither the plaintiff's predecessor in title nor the plaintiff nor any owner of any of the plots ever during fifty years sought to do or called on his neighbours to join with him in doing what was necessary (namely, the removal of the walls and the making a gradient to reach the higher level of Church Road) to make possible the carriage way which had been granted to him.

This was, I think, an abandonment of the whole scheme. There never existed a state of things in which the right of carriage way could exist or be exercised. There was acquiescence for fifty years in abstention from doing or enforcing the acts necessary to allow of the existence or exercise of the right of way. This, I think, was evidence of intention to renounce all that which the deed of 1871 had directly or by implication provided for the creation of the way over which the right of way was to extend. For these

(1) 14 App. Cas. 12. (2) 7 Ex. 838.
(3) L. R. 2 Ch. 478, 482.

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reasons I think that the action was rightly dismissed and that this appeal should be dismissed with costs.

LORD CARSON. My Lords, for myself I agree with the judgments which have already been given, and I have nothing to add.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 21, 1924.

Solicitors for the appellant: *Stanley Evans & Co.*
Solicitors for the respondent: *Davey & Pearce.*

[HOUSE OF LORDS.]

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OWNERS OF S.S. MELANIE . . . APPELLANTS;
AND
OWNERS OF S.S. SAN ONOFRE . RESPONDENTS.

Shipping—Salvage—Towage after Collision—Statutory Duty to stand by—Conditions justifying Award.

Per Viscount Finlay: Except in cases of absolute necessity, the Court which tries a claim for salvage should itself assess the amount of the award.

Per Lord Phillimore: The duty cast by the Merchant Shipping Acts upon one of two colliding vessels to stand by and render assistance does not prevent that vessel, if she renders assistance, from claiming salvage.

In a collision, which occurred in the Bristol Channel between the *S.* and the *M.* on a foggy morning in December, 1916, the *S.* struck the *M.* on her starboard side and made a large hole in her, with the result that the engine room and one of the holds filled with water. The master of the *M.* believing that he was in immediate danger of sinking, he and most of the crew climbed on to the *S.*, and the rest of the crew boarded the *U.*, an armed steam trawler which was escorting the *S.* As the *M.* did not sink, the master of the *S.* proposed, with the assistance of the *U.*, to tow her to Barry, and the crew of the *M.* returned to her and lashed her to the *S.* on the starboard side and to the *U.* on the

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

port side. After towing for three-quarters of an hour all three vessels inadvertently grounded on a ledge of rocks near the shore. The *S.* and the *U.* got off soon after and left the *M.* on the rocks. When the tide fell the water in the *M.* drained out of her, and the master, by closing a watertight door between the hold and the engine-room, was able to prevent the water coming into the hold. Both the *S.* and the *M.* were badly damaged by the grounding. The *M.* was successfully towed to Barry by two tugs on the following day.

Upon a claim for salvage by the owners of the *S.* for towing the *M.* Bailhache J., acting on the advice of his assessors, decided that the towage had not materially contributed to the ultimate safety of the *M.* and dismissed the claim, but the Court of Appeal, on the advice of their assessors, came to the contrary conclusion:—

Held (Lord Blanesburgh doubting), that there was ample evidence to support the decision of the trial judge, and that it ought not to be disturbed.

The authorities reviewed by Lord Phillimore.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a decree of Bailhache J. sitting as a judge of the Probate, Divorce and Admiralty Division, assisted by two of the Elder Brethren of the Trinity House as Nautical Assessors.

The question raised by the appeal was whether the respondents, who were the plaintiffs in the action, the owners, master and crew of the steamship *San Onofre*, were entitled to salvage for towing the steamship *Melanie* after the vessels had been in collision with each other. This question depended on the question of fact whether the *Melanie*, after being towed by the *San Onofre*, was in a materially better position than she would have been if the *San Onofre* had not taken her in tow.

The facts are fully stated in the judgment of Lord Phillimore, and are summarized in the headnote.

Bailhache J., acting on the advice of the Nautical Assessors, decided that the position of the *Melanie* was not improved by the towage of the *San Onofre* and dismissed the claim for salvage.

In the Court of Appeal the Nautical Assessors, who assisted the Court, disagreed with the Nautical Assessors in the Court below, and the Court (Bankes, Scrutton and Atkin L.JJ.), relying on their advice, reversed the decision of Bailhache J. and pronounced in favour of the plaintiffs' claim for salvage,

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and remitted the claim to the Admiralty Division to assess the amount of the remuneration.

This case is reported for the sake of the discussion of the law of salvage contained in the judgment of Lord Phillimore.

1924. Nov. 10, 11, 13. *Sir John Simon K.C.* and *Dunlop K.C.* (with them *Harold Stranger*) for the appellants. The Court of Appeal were wrong in assuming that the master of the *Melanie* would not have returned to the ship. A mere temporary abandonment of the ship does not relieve the master and crew of their duty to return to her: *The Portreath* (1); *The Celt.* (2) The Court also attached an exaggerated importance to the draining out of the water when the *Melanie* was on the rocks. Having regard to the rise and fall of the tide this was insignificant; it was not an issue in the action and was not relied on in the pleadings as a benefit. After the collision there was a statutory obligation on the *San Onofre* to stand by and assist if she could have done so without danger to herself: Merchant Shipping Act, 1894, s. 422, though there was no statutory obligation on her to tow. But in these circumstances Butt J. in *The Beta* (3) expressed a doubt whether the owner was entitled to salvage remuneration for towing, even though, as in this case, the ship was not to blame for the collision. To succeed, the respondents must prove that the ultimate safety of the ship was attributable in whole or in part to their exertions. On the evidence Bailhache J. was right in concluding that the efforts of the respondents did not put the ship in a better position to be saved.

Bateson K.C. and *Dumas* for the respondents. The respondents, the first salvors, have rendered useful and effectual service towards the ultimate safety of the ship. In cases of doubt the Court of Admiralty, looking to the general maritime interest in inducing men to assist life and property in danger at sea, leans in favour of the salvors. Kennedy L.J. so lays down the law in his book on Salvage, 2nd ed.,

(1) [1923] P. 155, 161. (2) (1836) 3 Hagg. Adm. 321, 326.
(3) (1884) 5 Asp. M. L. C. 276.

pp. 36–38, on the authority of *The Henry Ewbank* (1) and *The E. U.* (2); and in criticizing *The Cheerful* (3) and *The Benlarig* (4) he suggests that in those two decisions the general principle of "no success no salvage" was applied somewhat strictly against the claimants. The *San Onofre* was the immediate instrument of saving the *Melanie* from danger, and she conferred a substantial benefit upon her. The ship would otherwise have been left derelict. If by reason of the salvage service the ship is placed in a position of comparative safety the salvors will succeed in their claim. *The Santipore* (5); *The Atlas* (6); *The Camellia.* (7) On the other hand, if the salvors quit the vessel before the salvage service is completed, their claim will be disallowed: *The India.* (8) So too where the Court is advised that the ship, as the result of the salvage service, is in a worse, or in no better, position than she was before: *The Lepanto* (9); *The Dart.* (10)

Sir John Simon K.C. replied.

The House took time for consideration.

1924. Dec. 19. VISCOUNT CAVE L.C. My Lords, the question which your Lordships have to determine on this appeal is whether, having regard to the action taken by the steamship *San Onofre* after her collision with the steamship *Melanie* on December 27, 1916, the former vessel is entitled, as the Court of Appeal have held, to a salvage award or, as Bailhache J. had held, to none. No question as to the measure or amount of the award (if any) arises on this appeal.

The legal principles to be applied in a case of this character are not in dispute. In order to earn a reward for salvage a vessel must not only have endeavoured to rescue another from loss at sea but must have done so to some purpose; that is to say, the latter vessel must have been actually

(1) (1833) 1 Sumner, 400, 414, 415.
(2) (1853) 1 Spinks (E. & A.), 63.
(3) (1885) 11 P. D. 3.
(4) (1888) 14 P. D. 3.
(5) (1854) 1 Spinks (E. & A.), 231.
(6) (1862) Lush. 518, 527.
(7) (1883) 9 P. D. 27, 31.
(8) (1842) 1 Wm. Rob. 406.
(9) [1892] P. 122, 128–9.
(10) (1899) 8 Asp. M. L. C. 481.

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salved and the former must have contributed to that result. An attempt at rescue, however meritorious and however costly to the would-be rescuer, if not attended by success, gives no right to any salvage reward. Sir John Coleridge, in delivering the judgment of the Privy Council in *The Atlas* (1), said that if the ship or cargo were not saved there could be no salvage; but he added that "where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share of the reward, although the part they took, standing by itself, would not in fact have produced it." It was on this principle that salvage was awarded in *The Killeena* (2) and *The Camellia* (3) and refused in *The Cheerful* (4) and *The Tarbert.* (5) Cases like *The Benlarig* (6) and *The Lepanto* (7), where the claim was not for salvage but for payment for work done on request, stand of course on a different footing.

In the present case, the *Melanie* undoubtedly reached port, though in a damaged condition; and the question is whether the efforts of the *San Onofre* contributed materially to that result. The main facts of the case may be very shortly stated. After the collision, which has been held to have been due to bad seamanship on the part of the *Melanie*, the two vessels separated; but the *San Onofre* afterwards came up to the *Melanie* and put on board her some of her officers and crew who at the time of the collision had taken refuge on the *San Onofre*. It was then ascertained that the *Melanie*, although one of her holds (Hold No. 2) was flooded, was not sinking; and thereupon she was made fast to the *San Onofre* on the starboard side and to the *Urania* (who was escorting the *San Onofre*) on the port side, and these two vessels attempted to tow her into Barry Roads. Unfortunately, owing to the set of the tide or to some other cause, and (as it has been held) without negligence on the part of the *San Onofre*, the three vessels grounded on a ledge of rocks

(1) Lush. 518.
(2) (1881) 6 P. D. 193.
(3) 9 P. D. 27.
(4) (1885) 11 P. D. 3.
(5) (1921) 15 Asp. M. L. C. 423.
(6) (1888) 14 P. D. 3.
(7) [1892] P. 122.

near the Stout Point. Some few hours afterwards, the tide having risen, the *San Onofre* floated and left the *Melanie* on the rocks; and next morning the *Melanie* also floated and was safely towed by two tugs to Barry. The bottom of the *Melanie*, as well as that of the *San Onofre*, was badly damaged by the rocks. The tugs obtained a salvage award of 1650*l*., and the question is whether the *San Onofre* is also entitled to an award.

Bailhache J., who heard the action, held that the *San Onofre* had not contributed to the rescue of the *Melanie* so as to be entitled to salvage; but the Court of Appeal took the opposite view. The question is one of fact; and I can only say that, having carefully listened to the evidence and the arguments of counsel, I do not think that there was sufficient ground for disturbing the judgment given at the trial. The action of the *San Onofre* in standing by and putting some of the *Melanie's* crew on board her was not, I think, a salvage service. The *Melanie* was not an abandoned ship; and the weather being what it was, the *San Onofre* could hardly have sailed away with the *Melanie's* crew without endeavouring to ascertain the condition of the *Melanie* and giving her crew a chance of returning to her. The towage was no doubt a meritorious attempt, but unfortunately it failed in its effect owing to the accident of grounding; and the only result was that the *Melanie*, instead of being brought into harbour, was piled up on the rocks with a damaged hull and little (if at all) nearer to port than when the towage began. It is true that the *Melanie*, being (as Mr. Dumas put it) "safely on the rocks," could not and did not sink; and, it is also true that, owing to her being on the rocks, her master was able, when the tide fell and the water ran out of her No. 2 hold, to close the watertight doors and so prevent the water from again entering the hold when the tide rose; but it is not proved that these facts saved the *Melanie* from loss. The weather, though foggy, was fine, and there was no wind and no sea; and it is a probable conjecture that, if the *Melanie* had been left to lower her anchors and use her bell, she would have remained afloat until the fog lifted, and could

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then have been towed safely into port. If the weather had changed, she might no doubt have been in danger; but in that event her position upon the rocks would have been not less serious. The trial judge was advised by the Trinity Masters that, having regard to the weather as it was and to all the circumstances of the case, and to what might have been done to the *Melanie* had she been left in the position in which she was, she was in no better position when she was grounded on the rocks at Stout Point than she would have been if the *San Onofre* had not taken her in tow; and with this opinion the learned judge entirely agreed. The assessors who advised the Court of Appeal were of a different opinion; but the appeal was not from assessor to assessor, but from Court to Court. It appears to me that there was ample material upon which the trial judge could come to the conclusion which he reached, and that there was no sufficient reason for setting it aside.

For the above reasons, I am of opinion that this appeal should be allowed, and that the order of the Court of Appeal should be set aside, and the judgment of Bailhache J. restored, with costs here and below.

VISCOUNT FINLAY. My Lords, this is an action by the owners of the *San Onofre* steamship to recover for salvage services to the *Melanie* steamship. Bailhache J., before whom with the Trinity Masters the case was tried, dismissed the claim, but the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), sitting with assessors, reversed this finding. They did not, however, themselves settle the amount of the salvage remuneration, but sent the case to the Admiralty Division for that purpose, and the President, after a hearing, awarded to the owners of the *San Onofre* 21,500*l.*, and to her captain and crew 1500*l.*, of which 500*l.* was to go to the captain.

The *Melanie* and the *San Onofre* came into collision about 9.45 A.M. on December 27, 1916, in the Bristol Channel, a few miles to the south and east of Nash Point, in a dense fog. The *Melanie* was struck on her starboard side by the stem of the *San Onofre*, with the result that a large V-shaped

hole was made in the *Melanie*. The captain and most of the crew clambered up into the *San Onofre*, and the remainder went in a lifeboat to an armed steam trawler, the *Urania*, which was in attendance upon the *San Onofre*. The *Melanie* did not sink, as had been feared, and she was taken in hand by the master of the *San Onofre*, with the intention of taking her to Barry, the *San Onofre* being made fast on the starboard side of the *Melanie* and the *Urania* on her port side. The towage began at 10.30 A.M., and at 11.45 A.M., the fog still continuing, all three vessels ran on the rocks at Stout Corner, a few miles to the east of the spot of the collision. The *San Onofre* and the *Urania* were speedily got off and taken up channel. The *Melanie* floated as the tide rose, but having been anchored remained over the spot where she had been aground, swinging to the tide, and next day she was taken to Barry by two tugs.

Both the *Melanie* and the *San Onofre* sustained a good deal of damage to the bottom by this grounding, the former to the amount of 8000*l.* and the latter to the amount of 19,000*l.*

In another action in the Admiralty Division it was decided by Hill J. that the stranding was not caused by any negligence on the part of those in charge of the *San Onofre*, and the present case must be dealt with on this footing.

Bailhache J., by whom the present action for salvage reward was tried, explained the legal position in the course of his judgment as follows (Appendix, p. 69): "Now, in these circumstances, as I have said, the *San Onofre* claims salvage; and there is no doubt that if I ought to find as a matter of fact that the *Melanie*, when she unfortunately by accident got aground on the Stout Point, was by reason of the services rendered by the *San Onofre* in a materially better position than she would have been if the *San Onofre* had left her where she was when she was first of all picked up and taken in tow, somewhere about three miles to the southward of Nash Point—if those services really were beneficial to the *Melanie*, then undoubtedly the *San Onofre* ought to receive a salvage reward; and in considering that salvage reward

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account of course would have to be taken of the damages—19,000*l.* for the bottom damage—which the *San Onofre* sustained. It is, therefore, fundamental to make up one's mind whether the *Melanie* was in a materially better position when she found herself on the rocks at Stout Point. That is a point on which I, of course, have been advised, and have taken the advice of the Trinity Masters who are sitting with me in this case and advising me. They have advised me that, having regard to the weather as it was, and there being no sea, no wind, fine weather; and having regard to all the circumstances of the case, and to what might have been done with the *Melanie* had she been left in the position in which she was, in fact she was in no better position when she was aground on the rocks at Stout Point than she would have been had the *San Onofre* not taken her in tow. I need not go into the reasons which have led me to that result. We have discussed the matter, and that is the result at which they have arrived and the result which I have accepted, which is a result with which, if I may say so, I personally entirely agree."

This finding was reversed in the Court of Appeal, sitting with Nautical Assessors.

Two questions were put by the Court of Appeal to the assessors. The first was: "Having regard to the weather conditions, was the water in No. 2 hold and the tunnel of the *Melanie* after collision a source of danger to the vessel?"

To this the assessors answered: "Yes."

The second question was: "Do you consider that the towage of the *San Onofre*, though it resulted in the *Melanie* going aground, did place the *Melanie* in a safer position than she probably would have been in had the *San Onofre* left her immediately after the collision?"

To this the assessors replied: "Yes."

Of these two answers the second is the more important. The water in No. 2 hold and in the tunnel of the vessel may have been a source of some danger to the *Melanie*, but there is no reason to think that it was material. The second question is, for the purposes of the salvage claim, all-important. The Court of Appeal, in conformity with the advice they

received, held that the *Melanie* was after the stranding in a safer position than she was before the *San Onofre* took her in hand after the collision. It was strenuously maintained in argument before your Lordships that the Court of Appeal were right in reversing the decision of Bailhache J. on this point. The main ground urged was that but for the *San Onofre* the *Melanie* would have been abandoned after the collision, so becoming derelict. I think that it is impossible to treat the fact that the captain and crew immediately after the collision took refuge on the *San Onofre* and the *Urania* as an abandonment of the *Melanie*. It was natural and proper that they should at that time leave her. The damage done by the collision was very serious, and it was apprehended that she might sink. But she did not sink, and there is no sufficient evidence that the master and crew would have abandoned the *Melanie* even if the *San Onofre* had left her. It is highly improbable that the *San Onofre* would have so sailed away, and still more improbable that she would have carried all the crew of the *Melanie* with her. The *Melanie* was a very valuable vessel, and I think that we ought not to assume, as we were asked to assume, that the captain and crew of the *Melanie* would have left her to drift about as a derelict. What would probably have happened is that a part of the crew would have taken her in charge and anchored her. It is immaterial that the *Melanie* was not in a position to use her foghorns, being unable to get up steam, as when the vessel was at anchor the foghorn would not be wanted, the use of her bell being the proper mode of giving warning of her presence to passing vessels.

In these circumstances it appears to me that there were not sufficient materials to justify the reversal of the finding of fact by the judge of first instance.

The services rendered by the *San Onofre* were undoubtedly meritorious, as Bailhache J. says, but in the result the plight of the *Melanie* on the rocks was not materially better than it would have been at anchor at the spot where the collision took place.

This conclusion, at which the Court of first instance,

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with the assistance of the Trinity Masters, arrived, should not, in my opinion, have been set aside. The question which Bailhache J. put as that on which the decision of the case should turn, was beyond all doubt the right one—I have already cited the passage in which it is stated.

If the *San Onofre* had materially improved the position of the *Melanie*, the *San Onofre* would be entitled to a substantial salvage award, though it was by others that the vessel was brought into port, inasmuch as the *San Onofre* would have materially contributed to the salvage. But Bailhache J. found, and in my opinion rightly, that there had been no such contribution by the *San Onofre* to the ultimate safety of the *Melanie*.

I wish to add that it seems to be very undesirable that the amount of a salvage award should be fixed by a Court other than that which tried the case. In order to estimate the amount to be given, the nature of the services must be appreciated, and this duty can best be discharged by the Court before which the trial was conducted. We have been informed that this is the first case in which an order has been made that the assessment of damages should be sent to another Court, and except in cases of absolute necessity it appears to me that the Court which tries the case should also assess the remuneration.

In the present case, for the reasons which I have given, I think that the judgment appealed from should be reversed, and the judgment of Bailhache J. restored.

LORD PHILLIMORE (read by LORD BLANESBURGH). My Lords, on the morning of December 27, 1916, the steamships *Melanie* and *San Onofre* were coming up the Bristol Channel in ballast and were off or a little further above Swansea—the *Melanie* being the leading ship. A fog came on, or they ran into a fog, and the *Melanie* determined to anchor, which may have been a wise action on the part of the master. He carried it out, however, unwisely, for he ported his helm, perhaps to stand out from the land, but with the actual effect of throwing his vessel across the course of any following ship, and he

further unwisely gave the signal R with his whistle, indicating that the way was off his ship and that other ships could safely pass ahead of him, whereas in fact he had way upon him, and the ship was not turning on her heel but was describing a wider circle and forging ahead. The result was that the *San Onofre* ran into the starboard side of the *Melanie* almost at right angles and made a V-shaped cut into the engine-room, reaching down into the bilge.

While the two vessels were still in contact, the master and some of the officers and crew clambered over the bows of the *San Onofre*, which was the larger and higher vessel, while the remainder of the crew got into the remaining lifeboat (the other having been smashed) and proceeded on board the armed trawler *Urania*, which had been escorting the *San Onofre*.

The master of the *Melanie* is said to have conceived and spoken of his ship as a lost vessel. It so happened that he had at one time served as an officer under the master of the *San Onofre*. Both were British ships. The *San Onofre* then backed out of the *Melanie*, but came up to her again, and the master of the *San Onofre* then observed that she was apparently not sinking, and he formed the idea of taking her in tow with the assistance of the *Urania* and getting her up to Barry Roads.

The facts were that the water was coming into the engine-room and into the screw tunnel and also into No. 2 hold, because the doors between that hold and the engine-room had not been closed. But No. 1 hold was intact, and so was No. 3, unless there was some weeping from the screw tunnel; and the vessel had still a considerable reserve of buoyancy. The master says that her loaded draught was 21 feet, and he should say that before the collision she was drawing about 8 feet 6 forward and 10 feet 6 aft. He estimated her draught at the moment when the *San Onofre* came up to her again as being a mean draught of about 14 feet, the ship being rather by the head. But as he also said that when she was ultimately towed to Barry, at which time her No. 2 hold was dry, her draught was 14 feet, it is probable that at the moment we are discussing she was drawing more.

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At any rate the master of the *San Onofre* thought that he might be able to tow her with the assistance of the *Urania* to Barry Roads; and the two vessels seem to have been brought sufficiently close to each other to enable two of the officers of the *Melanie* and some of the crew to scramble on board her. The master of the *Melanie* gave as an excuse for not going on board himself that he was getting elderly and not so nimble. It might not have been an easy job. The officers and crew who got on board the *Melanie* got out her ropes, and with them the *San Onofre* was made fast—"breasted" as it is called—on the starboard side and the *Urania* on the port side, and they proceeded to tow.

The direction intended was Barry Roads, but the master of the *San Onofre* thinking, as he said, that there was just a possibility of her sinking, proposed to get near the Welsh shore and tow along in somewhat shallow water. It appears that the tide was about half-ebb and set somewhat strongly towards the Welsh shore, and whether the three vessels during the three-quarters of an hour which elapsed between the collision and the start to tow, had drifted considerably towards the Welsh shore, or whether the Master of the *San Onofre* did not sufficiently allow for the drift when he was towing, or whether all along in the thick fog the vessels had been out of their reckoning, it so happened that after three-quarters of an hour's towage all three vessels apparently simultaneously took the ground on a ledge of rocks about half-a-mile east of Stout Corner and about two or three miles east of Nash Point. The *San Onofre* endeavoured to back off, but the main injection became choked, and she had to give it up. The ropes were cast off, a ladder was put out between the two ships, and the master of the *Melanie* went on board her. As the tide ebbed, the water drained out of No. 2 hold, and the master of the *Melanie* closed the doors between that hold and the engine-room.

The collision had been about 9.45 A.M. The towage began about 10.30, and the grounding was about 11.15. While the towage was proceeding, and before they grounded, the master of the *San Onofre* had used his wireless to report that

he had had a collision with the *Melanie*, that she had been holed, and that he was towing her to Barry. After she got ashore, he sent a second wireless message to say that they were ashore six miles west of Barry, that both vessels were damaged, and tugs must be sent immediately. The *San Onofre* floated between 5.30 and 6 P.M. and having tug assistance got away to Barry. The *Melanie* floated later, and was towed away next morning by two tugs to Barry. A salvage award has been made in their favour to the amount of 1650*l.* The *San Onofre* received trifling damage in the collision, but in consequence of her stranding she received damage to her bottom which it cost 19,696*l.* to repair. The *Melanie* had damage to her bottom which cost 8080*l.* to repair.

These incidents gave rise to a large crop of litigation. There was first the collision action. This was tried before Hill J., who on March 16, 1917, found both vessels to blame. There was no doubt about the negligence of the *Melanie*, but Hill J. thought that the *San Onofre* was going too fast in the fog and ought to have done more to take off her way when she heard the R signal. The Court of Appeal on March 5, 1918, varied this judgment by holding the *Melanie* alone to blame, and this decision was confirmed by your Lordships' House on May 15, 1919.

Meanwhile, almost immediately after the decision of the Court of Appeal—namely, on March 16, 1918—the owners of the *Melanie* brought an action against the *San Onofre* claiming damages for the stranding as being due to her negligence. This action was heard on June 13, 1919, by Hill J., when it was decided that the stranding was an accident and had not been brought about by negligence. There was, as far as I gather, no appeal from this decision.

Then the owners of the *San Onofre* turned the tables on the *Melanie* and claimed to reckon as part of the damage which they had sustained in the collision, the damage which was due to her stranding, as being consequential upon the collision. The registrar and merchants accepted this view in their report dated July 19, 1921, but the President reversed their decision on March 14, 1922, and the Court of Appeal

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affirmed the President's decision on May 31. I shall find it necessary to revert in some detail to this portion of the litigation.

The present action was begun on March 16, 1918, claiming salvage on behalf of the owners and master and crew of the *San Onofre*. But proceedings in it seem to have been suspended during the other litigation, as I see that the statement of claim was not delivered till March 6, 1923.

By this statement, the plaintiffs asserted that they had rescued the *Melanie* from a position of the utmost danger and, in fact, from certain total loss and had placed her in a position of safety. They further said that the services were rendered by the *San Onofre* at a very high degree of risk due to the dense fog which had led to the grounding of the three vessels, and they set out the items comprising their own damage due to the stranding, making a total of 19,696*l.* as an ingredient to be considered in the salvage award.

The defence was in substance that the plaintiffs left the *Melanie* in a position of greater comparative danger than she was in before the *San Onofre* began to tow, and that therefore no salvage was due. The case was heard by the late Bailhache J. sitting as an additional judge of the Admiralty Division with the assistance of Trinity Masters, and on June 29, 1923, the learned judge delivered judgment accepting the view of the defendants and holding that no salvage was due.

The plaintiffs appealed to the Court of Appeal, and on December 3, 1923, that Court, consisting of Bankes, Scrutton and Atkin L.JJ., assisted by Nautical Assessors, came to the contrary conclusion. Instead, however, of fixing the sum which should be paid for the salvage, the Court referred this assessment to the Admiralty Division—an unusual step.

This appeal was then preferred to your Lordships' House. But meanwhile the assessment has proceeded notwithstanding the appeal, and was taken before the President with the assistance of Trinity Masters. He on January 16 last—hearing the case upon the same materials as were before

Bailhache J. and the Court of Appeal—assessed the figure at 23,000*l.*, 1500*l.* of which was to go to the master and crew. The 21,500*l.* which was to go to the owners was arrived at, as the judgment shows, by placing the whole burden of the 19,696*l.* upon the *Melanie* and giving to the owners of the *San Onofre* in addition the sum of 1904*l.*

The procedure which I have last recounted puts your Lordships in a position of some difficulty. If the Court of Appeal, after coming to the conclusion that it was a salvage case, had proceeded to fix the sum due, and it should have happened that your Lordships agreed that it was a case of salvage but thought that in fixing the quantum of award the Court of Appeal had proceeded on a wrong principle, it would have been open to this House to vary the order of the Court of Appeal in respect of amount. But since the assessment was remitted to the Court below, it would be awkward for your Lordships to deal with it, unless and until an appeal from the President had travelled the usual course through the Court of Appeal to your Lordships' House. The result is that the only question which your Lordships will think fit to deal with on the present occasion is salvage or no salvage.

I do not disguise from myself that this is a difficult and delicate matter, and that my mind has fluctuated possibly more than once during the course of the hearing.

One matter may be cleared away. The counsel for the appellants rightly insisted upon the importance of s. 422 of the Merchant Shipping Act, 1894, which runs as follows: "In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any), to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable." He did not, however, as I understand, desire to contend that the duty to assist in certain cases deprived the assisting vessel of the right to salvage.

This is, I believe, the first opportunity which this House has had of pronouncing upon a question which has, I imagine,

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long been treated as settled in the Courts below. Ever since the judgment of Sir Robert Phillimore in *The Hannibal* and *The Queen* (1)—accepted, I think, in the Privy Council, though there was another ground on which the decision was confirmed—it has been taken as law that the duty cast by the Merchant Shipping Acts upon one of the two colliding vessels to stand by and render assistance, does not prevent that vessel if she renders assistance from claiming salvage. That particular judgment was given upon the construction of the Merchant Shipping Act of 1862; but there is no material difference in the section which must govern this case. I am glad that your Lordships have the opportunity of giving your adhesion to this doctrine.

On the general question several authorities have been cited at your Lordships' Bar. All those which were earlier in date than the second edition of Kennedy L.J.'s work on salvage are to be found cited under the head "Success" in the second chapter of that work. The principles may be summed up in these words: Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes expressed meritorious contributions to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward.

In considering these questions wherever the service has been meritorious, the Court has leant towards supporting a claim for salvage, as is shown by the cases of *The Jonge Bastiaan* (2); *The E. U.* (3); and *The Santipore* (4) among other authorities.

That partial or initial service, if it can be shown to have been a factor of or contributory to ultimate success, is a subject of salvage reward, is shown by a line of cases of which the

(1) (1867) L. R. 2 A. & E. 53.
(2) (1804) 5 C. Rob. 322.
(3) 1 Spinks (E. & A.), 63.
(4) 1 Spinks (E. & A.), 231.

decision of the Privy Council in *The Atlas* (1) and of Sir James Hannen in *The Camellia* (2) are good examples.

That meritorious action which does not contribute to ultimate success must go without reward is shown by such instances as *The India* (3); *The Edward Hawkins* (4) (a decision of the Privy Council); *The Killeena* (5); and my own decision, if I may quote it, in *The Dart* (6), and a recent decision of Hill J. in *The Tarbert.* (7) This case was not, I think, cited by counsel, but has some features of marked resemblance to the case which your Lordships are now discussing.

Such cases as *The Cheerful* (8), *The Benlarig* (9), and *The Lepanto* (10) are cases a fortiori. In them the Court found that the effect of the services was to put the vessel in a worse position than she was in before.

To the propositions which I have stated, I would add a corollary. The mere fact that the claimant has brought the ship to a position or spot where the ultimate salvor has found her, does not of itself show that the bringing to that spot was a contribution to the ultimate success. This last proposition is supported by the cases of *The India* (3) and *The Killeena.* (11) If it were otherwise, in every case where there was ultimate salvage every person who rendered any service would be a salvor. In cases like *The Camellia* (2) the view taken was that the ship had been brought into or nearer to the track of vessels, and, to use the language of Kennedy L.J., into a position of greater comparative safety. On this ground also Bruce J. decided the case of *The Hestia.* (12)

I have now to apply these propositions to the facts of the present case. There is no doubt that the *Melanie,* whose value then was a little under 64,000*l.*, was immediately after the collision in a position of considerable danger, and that

(1) Lush. 518.
(2) 9 P. D. 27.
(3) 1 Wm. Rob. 406.
(4) (1862) Lush. 515.
(5) 6 P. D. 193; 4 Asp. M. L. C. 472.
(6) 8 Asp. M. L. C. 481.
(7) 15 Asp. M. L. C. 423.
(8) 11 P. D. 3.
(9) 14 P. D. 3.
(10) [1892] P. 122; 7 Asp. M. L. C. 192.
(11) 6 P. D. 193.
(12) [1895] P. 193.

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between 55,000*l.* and 56,000*l.* worth of her was—at the cost of 1650*l.* paid to the tugs—ultimately brought to a place of safety.

During the argument I found myself considering whether one could evaluate the risk to the *Melanie* untowed, and compare it with the loss which she sustained by reason of the stranding, and if the former were the greater, treat the excess as giving the measure of the benefit which the salvors had incurred. But this mode of reasoning has not seemed to commend itself to your Lordships or to the respondents' counsel; and after reflection I have concluded that one ought to measure risk against risk—that is to say the risk of loss, total or partial, if the *Melanie* had been left untowed, with the risk of loss, total or partial, when the *Melanie* was landed on the rocks.

Now it may be that on perusing the judgment of Bailhache J. one sees small insistence on the danger to the *Melanie* if she had been left untowed; but, on the other hand, in the judgment of the learned Lord Justices, I can hardly trace any reference to the dangers of her second situation. I proceed to sum them up for myself as best I can.

Here I have further to consider the operation of s. 422 of the Merchant Shipping Act, which I have already quoted. The words "till there is no need for further assistance" mean primarily, as I apprehend, till it is seen that the other vessel, though injured, can manage for herself. Counsel for the respondents contended that they meant till it was seen that the vessel was bound to be lost—a meaning which is certainly not the primary one. I should quite agree, however, that there was no duty after the crew had been saved to stand by a vessel of which it could certainly be predicted that she must go to the bottom in a short time. That, however, is not this case.

It is said that the master of the *San Onofre* might, as soon as the two vessels parted, on being assured that no living soul remained on board the *Melanie*, have taken it for granted that she would sink and have steamed away at once. I think he would have put himself in peril if he had steamed

away without some examination; and, to do him justice, he did not. When he came up to her again, it was clear that she could not be treated as a vessel which was bound to sink in a few hours. She was not perceptibly getting lower in the water and had a considerable reserve of buoyancy. So far then the period for which the statute applies had not come to an end.

Now as to the other condition of the statutory requirement, that it must be without danger to the vessel standing by and to her crew and her cargo, if any. When the claim for consequential damage was argued before the President and before the Court of Appeal, the parts taken by counsel for the *San Onofre* and the *Melanie* were the opposite of those which they have taken in the present case. The *San Onofre* connected the collision and her claim for damage by stranding in this ingenious way. She said to the *Melanie*: "The collision was your fault; the statute made it necessary for me to stand by and assist. If the proper mode of assistance was by towage, in the course of towing, I—through no fault of mine—got aground and got serious damage. That is the consequence of the collision." The *Melanie* raised two defences. First she said: "You had no duty to assist as you did. It was too dangerous for you." And, secondly, she said: "The stranding was not in the legal sense a reasonable and natural result of the collision." (1) The President thought that this second defence succeeded. He also held that the towage which took the form of the *San Onofre* lashing herself alongside what he called a waterlogged vessel, was assistance which could not be rendered without danger, and therefore was assistance which the statute did not require.

In the Court of Appeal, Bankes L.J. said that he did not disagree with this last conclusion, and Scrutton L.J. laid stress on the danger involved in taking the *Melanie* in a fog towards the shore. But the governing ground in the decision of the Court of Appeal was that the stranding was not a natural and reasonable consequence of the collision.

I should, however, not be disposed to allow the appellants'

(1) [1922] P. 243; 16 Asp. M. L. C. 1.

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counsel in the present case—particularly after the way in which the previous case was conducted—to contend that there was a statutory duty on the *San Onofre* to tow the *Melanie*, still less that there was a statutory duty to tow her by breasting alongside.

But that by no means exhausts the matter. Before the duty to assist, comes the duty to stand by, and that matter did not arise for decision in the litigation to which I have just been referring. The counsel for the appellants have contended before your Lordships with force that the *San Onofre* had a wireless installation and had signalled; and that tugs could have been got at Barry, apparently only about eight miles off, and that all that was needed was that she should have stood by and thereby have given heart to the crew of the *Melanie*, several of whom got on board her. Counsel has argued that they could easily, as they got out the ropes for towage, have let go an anchor, which it is said they were preparing to do before the collision; that though there was fog, she had her proper fog protection in her bell and did not require a steam whistle; that if need were, the *San Onofre* could have anchored, or she could have—as she did—taken the *Melanie* in tow.

I see objections to these contentions, but not such as wholly to neutralise them. There would be some danger in anchoring in fog if it were—as probably by this time it was not—in the track of vessels. I say by this time, because I can only understand the stranding by supposing that the vessels were all along drifting with some rapidity towards the Welsh shore.

But in truth the policy of merely standing by was not a very practical policy. If the ship was compelled by law to stand by till the other vessel was sunk or safe, the natural thing was to redeem the duty of standing by, by towing.

This is, I think, the idea which was underlying the mind of the late Butt J. in the case of *The Beta* (1), a case which at first blush it is difficult to understand. There a small schooner by her own fault came into collision with a steamship, and

(1) 5 Asp. M. L. C. 276.

the steamship having towed her some little distance towards a safe port, claimed salvage. I gather that the collision action and the claim for salvage were tried together. I think that Butt J., in refusing salvage, was influenced by the consideration that the steamship had by statute to stand by, which of itself would give no title to salvage, and that it was cheaper for her to get the schooner to a safe place than to stand by till something else could be done. His words are: "In my view of the Act of Parliament, if the steamer had not chosen to tow the schooner she would have had to stay by her a very long time, because she would not have dared to have left her."

All this being so, I cannot bring myself to think that the master of the *San Onofre* could have left the *Melanie* derelict. There is also another consideration. If the *Melanie* had been left derelict, she would, unless previously collided with, have drifted ashore. There was some chance of collision because she had no steam whistle and would have nobody to work it or to ring the bell. But, as I have observed, she was drifting out of the track of vessels. If she had drifted ashore, her whereabouts would not have been so soon discovered, and she probably would not have been beached in time to close the doors of No. 2 hold before the flood-tide made; but she might quite possibly have drifted on sand instead of rocks, and in the end suffered less.

My Lords, I have done my best to appreciate her risk of total or partial loss, if the *San Onofre* had not taken her in tow. Now I come to the other side.

What was her risk of total or partial loss when she was (to use the phrase of Bailhache J.) "aground on the rocks"?

Here I am much impressed by the survey of her damage. The grounding damage is separated in the report of survey from the collision damage, and is to be found at pages 95 to 99 of the record. Counsel for the respondents commented on the little evidence that there was of plates in the bottom being holed. It is fair also to say that any holes into the ballast tanks would—if they also were not rendered leaky—be, I suppose, immaterial. But when one notices the way in which frames, angle-irons and floor plates were buckled, one says

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to oneself if instead of two plates holed there had been three or four, and if they had been in No. 1 or No. 3 hold, and if owing to the twisting or buckling the ballast tanks had been rendered leaky, would this ship have ever been got off the rocks, or, at the best, would she not have required expensive pumps to be brought alongside before she floated and during her towage to Barry ?

My Lords, when I weigh these considerations I do not say to which if I were a judge of first instance sitting without the benefit of nautical advice, my judgment would incline. But I do say that, sitting as a member of your Lordships' House, I am unable to decide that Bailhache J., acting with the advice of his assessors, was wrong. And here I would observe that there is some trace in the judgment of the Court of Appeal of this being a case, not so much of the appellate judges differing from the judge of first instance as of the assessors of the Court of Appeal differing from the assessors of the judge. As to this I would quote the words of the noble Lord, the Earl of Birkenhead, given in the opinion which he delivered in the collision case between these same two ships: "My Lords, it would, I think, be intolerable if Admiralty appeals were treated as being not from one judge to another but from one assessor to another."

Upon the whole, my Lords, my voice would be for allowing this appeal.

LORD BLANESBURGH. My Lords, if I had to arrive at a conclusion in this case unassisted by the views which have now been expressed by the rest of your Lordships, I confess that I would, myself, have adhered to that which was reached by the Lords Justices in the Court of Appeal.

I should have been led to it mainly by the complete reserve with which a study of this prolonged litigation leads me to regard any evidence of the master of the *Melanie*, which is open to the suspicion of adjustment to meet the supposed demands of the moment. In that attitude of reserve, I should, I think, for myself, have reached the conclusion of fact that, except as parcel of the towage operation, there

would on this morning of December 27, 1916, have been no return to the *Melanie*, either of her master or of any of her officers or crew. Water-logged, as in earlier stages of the litigation it was suggested she was or was believed to be, she would, as the only practicable alternative to the towage operation, have been left in the Bristol Channel, in the fog, derelict and unattended.

It was only faintly suggested in argument that on that hypothesis the order of the Court of Appeal was not, as I think it would have been, fully justified.

But, my Lords, I have had the benefit of considering the judgments which have just been delivered. My distrust of some of the evidence in the cause may be greater than is justified, and accordingly I defer to the result there intimated by your Lordships, acquiescing in the motion which has been made by the Lord Chancellor on the ground stated by him.

My Lords, I am authorized to state that my noble and learned friend, Lord Shaw, concurs in the judgment of Lord Phillimore.

Order of the Court of Appeal reversed, and decree of Bailhache J. restored. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 19, 1924.

Solicitors for the appellants: *Downing, Middleton & Lewis.*
Solicitors for the respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

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GLASBROOK BROTHERS, LIMITED . APPELLANTS;

AND

GLAMORGAN COUNTY COUNCIL AND OTHERS . . . . . RESPONDENTS.

Police—Police Protection—Special Services—Agreement to pay for—Legality.

Although the police authority are bound to provide sufficient protection to life and property without payment, if in particular circumstances, at the request of an individual, they provide a special form of protection outside the scope of their public duty they may demand payment for it.

On the occasion of a strike a colliery manager applied for police protection for his colliery and insisted that it could only be efficiently protected by billeting a police force on the colliery premises. The police superintendent was prepared to provide what in his opinion was adequate protection by means of a mobile force, but refused to billet police officers at the colliery except on the terms of the manager agreeing to pay for the force so provided at a specified rate:—

Held (by Viscount Cave L.C., Viscount Finlay, and Lord Shaw of Dunfermline; Lord Carson and Lord Blanesburgh dissenting), that there was nothing illegal in the agreement, nor was it void for want of consideration.

Decision of the Court of Appeal [1924] 1 K. B. 879 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Bailhache J.

The action was brought by the respondents against the appellants to recover a sum of 2200*l.* 11*s.* for the services of police specially supplied by the respondents for the appellants at their request and by agreement with the appellants.

The appellants, by their defence, alleged that there was no consideration for the promise to pay, as it was the duty of the respondents to afford police protection without payment and that the agreement was signed under compulsion, the signature being extorted colore officii.

The appellants counterclaimed for 1330*l.* 4*s.*, the cost of housing and feeding the police so supplied.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD CARSON, and LORD BLANESBURGH.

(1) [1924] 1 K. B. 879.

Bailhache J. held that the respondents were entitled to the relief claimed and he dismissed the counterclaim.

The Court of Appeal by a majority (Bankes and Scrutton L.JJ., Atkin L.J. dissenting) affirmed the judgment of the learned judge.

The facts are fully stated in the report of the case before the Court of Appeal, and they sufficiently appear from the opinion of the Lord Chancellor.

1924. Nov. 3, 4, 6. *Sir John Simon K.C.* and *Montgomery K.C.* (with them *A. T. James*) for the appellants. Where a police authority render police protection which they are under a duty to give there is nothing to support a bargain for payment: *Morris* v. *Burdett* (1); *Collins* v. *Godefroy* (2); *Bilke* v. *Havelock* (3); *Dew* v. *Parsons* (4); *Morgan* v. *Palmer.* (5) Where there is a duty on the police authority to provide adequate police protection and there is a discretion as to the way in which that shall be done the law will not support a claim for payment by the police authority because the protection is afforded in one way rather than in another. The discretion vested in the police authority is not to be bought and sold. It is contrary to public policy to allow a public authority clothed with a discretion as to the manner in which their public duty is to be discharged to make a payment for exercising their discretion in the way in which the subject asks, as the receipt of payment would tend to bias the authority in the exercise of their discretion. Per Bayley J. in *Morgan* v. *Palmer.* (6) It is admitted that police protection in some form was required, and yet the appellants have been held liable to pay for the whole of it. The appellants' promise to pay was obtained upon a demand made colore officii and was in law not a voluntary promise, but one obtained under compulsion: *Steele* v. *Williams* (7); *Maskell* v. *Horner* (8); *T. & J. Brocklebank* v. *The King* (9),

(1) (1808) 1 Camp. 218.
(2) (1831) 1 B. & Ad. 950.
(3) (1813) 3 Camp. 374.
(4) (1819) 2 B. & Al. 562.
(5) (1824) 2 B. & C. 729.
(6) 2 B. & C. 735–6.
(7) (1853) 8 Ex. 625.
(8) [1915] 3 K. B. 106, 118.
(9) [1924] 1 K. B. 647, 653; C. A. [1925] 1 K. B. 52.

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since reversed on other grounds. There was no consideration for the promise to pay, because the police were merely discharging their public duty in affording protection to the colliery. A public authority, having public duties to perform, can only charge for their services when specially authorized by Act of Parliament. Assuming that this argument does not prevail, the position is this. A police authority cannot exact payment for anything which falls within the scope of their duty; secus where they are doing something which they may do if they think fit, but are not bound to do. They may make charges for works of supererogation only, as, for example, where police constables are provided to attend a wedding.

Vaughan Williams K.C. (with him *Trevor Hunter*) for the respondents. For eighty years the Legislature has recognized the practice of obtaining an agreement for payment for special police services as a proper and legal practice. This, therefore, was a lawful agreement. Then prima facie those who promise to pay must fulfil their promise unless they can show no consideration. It is conceded that an agreement to pay for something which there is a public duty to provide cannot stand, and if this charge were made for carrying out the duty of rendering adequate protection to life and property this action could never have succeeded. Where there is an agreement to render services which the police authority are not under any duty as a police authority to render at the request of an individual, there is no reason for saying that payment cannot be demanded. The respondents' case is that the superintendent of police, Colonel Smith, was affording adequate protection by a mobile force, quite apart from the police garrison stationed at the colliery, and that the supply of this garrison was an addition to the public duties of the police authority. Colonel Smith was the officer who had the duty of deciding what protection was necessary, and, if he came to the conclusion that people were suffering from undue nervousness, he was not bound to take further measures. The test is, was the officer, apart from the appellants' request, bound as part of his public duty to do the particular thing

requested? It was competent for him to say, "I consider this force unnecessary, but I am willing to provide it if you pay me." Apart from the agreement, the police continued to exert every effort necessary for the protection of the colliery, and, in fact, the colliery was protected twice over. For this additional protection, afforded at the request of the appellants, the respondents are entitled to demand payment. The issue is not whether Colonel Smith or the manager of the colliery was right, but whether Colonel Smith, in taking up the position that the protection already afforded was adequate, was acting in good faith, assuming that he had some reasonable ground for his opinion. If that is so, then there was good consideration for this contract. It cannot be suggested that there was here anything in the nature of extortion. The respondents do not dispute the law laid down in the authorities cited on behalf of the appellants, but they are very remote from the present case. That the police may receive payment for their services in particular cases is shown by *England* v. *Davidson* (1); *Thatcher* v. *England* (2); *Bent* v. *Wakefield and Barnsley Union Bank* (3); *Neville* v. *Kelly*. (4) [He also referred to *Glamorgan Coal Co.* v. *Glamorganshire Standing Joint Committee*. (5)] The legality of payments for special services of the police has been universally assumed for a great number of years, and the practice derives some support from the Police Acts: see Special Constables Act, 1838 (1 & 2 Vict. c. 80); Police Act, 1840 (3 & 4 Vict. c. 88), s. 19; Police Act, 1890 (53 & 54 Vict. c. 45), s. 16, sub-s. 1 (*e*) (now repealed by the Police Pensions Act, 1921). There is no distinction in substance between this case and the common case of lending the services of the police for a wedding.

Sir John Simon K.C. replied.

The House took time for consideration.

1924. Dec. 19. VISCOUNT CAVE L.C. My Lords, the national coal strike, which commenced on April 1, 1921,

(1) (1840) 11 A. & E. 856.
(2) (1846) 3 C. B. 254.
(3) (1878) 4 C. P. D. 1.
(4) (1862) 12 C. B. (N. S.) 740.
(5) [1916] 2 K. B. 206.

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came to an end on July 4 of that year, certain terms being then agreed upon as to the payment of wages to the miners. The appellants, Glasbrook Brothers, Ld., who are the owners of a valuable group of collieries in Glamorganshire situated about two miles from Swansea, proposed to pay their men (numbering about 1000) on the agreed scale; but this was not agreeable to the men, some of whom had before the strike been receiving better terms, and they refused to return to work. During the strike the "safety men" at the appellants' collieries—that is to say, the men employed to attend to the pumping which was necessary in order to preserve the mines from flooding—had been allowed to continue at work; but when the miners decided to remain out on strike they insisted (doubtless as a means of forcing the appellants to accept their terms) that the safety men should cease work and put severe pressure upon those men to comply with their wishes. During the week beginning on July 4 crowds of miners went to the collieries, and a deputation representing the miners was admitted to the works and had an interview with the safety men. Picketing which was not of a peaceful character took place, one of the safety men when on his way to the works was pulled off his bicycle; and the workmen's committee informed Mr. James, the agent for the collieries, that "they meant to get all the safety men out." As a result of this pressure the safety men held a meeting and resolved that owing to the pressure put upon them and the insufficient police protection, they would not work any longer; and on Saturday, July 9, the safety men who were expected (six at each of the two principal collieries) did not turn up, and the fires had to be drawn and the pumping discontinued.

On the same day—July 9—Mr. James went to the police station at Gowerton and saw Lieutenant-Colonel Smith, the superintendent of the "H" Division of the Glamorganshire Constabulary, told him the facts, and said that it would be necessary to have police billeted in the colliery. Colonel Smith demurred, saying that he was able to protect the collieries without installing a police garrison. He had been keeping

what he called a thin shield of police at the colliery to watch and give information if any large body of miners appeared, and in that event an ample force of police could at once be sent up; and he thought that with such a body of watchers at the points of danger and a mobile force of police ready for action wherever they might be required he was stronger than with the garrison. Mr. James, however, insisted on his view and asked for a garrison of 100, adding: "I am of opinion that a garrison is the only thing that will inspire our fellows with confidence to work"; and Colonel Smith gave in, but suggested that seventy men would be enough for the purpose, and said that as it would be "special duty" a requisition must be signed containing a promise to pay. Mr. James, who had been previously authorized by his directors to sign such a requisition, assented, and at once signed a requisition in the following form:—

"Glamorgan Constabulary.

Form of Requisition for special services of police.

Garngoch Collieries,

Gorseinon,

9th July, 1921.

Sir,

. . . . Superintendent, two Inspectors, two Sergeants, and 66 Constables (in accordance with the First Schedule to this Form), are required for Special Duty at the Garngoch and Cape Collieries on the occasion of a strike from 6 P.M. on the 9th July, 1921 to .....M. on the .....1921.

I hereby guarantee payment on the conditions specified in clause 'C' of the Second Schedule to this form.

(Signed) A. JAMES.

To the Chief Constable."

The second schedule to the above requisition specified the amounts to be paid and the quality of the food to be supplied to the police.

This matter having been settled, the police authorities, without reducing the force of police employed in the district, brought in seventy police from other divisions in the county

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and sent them up to the collieries, where they remained until the dispute was settled. For a few days the appellants employed some naval stokers, but this expedient was not successful and the fires were not at once re-lighted. On the following Tuesday, July 12, some of the safety men came to the works and expressed their willingness to resume work if they were billeted at the colliery; and ultimately they all came back and the fires were lighted on July 15 and pumping resumed. The safety men were informed that a force of police was in billet at the works, and no doubt their presence inspired confidence; but the duty of protecting the wives and families of these men, against whom some cowardly threats had been used, remained of course with the general body of police outside. After these events the behaviour of the miners appears to have improved, and no attack was made on the collieries or (so far as the evidence goes) at the homes of the safety men employed at the works. On August 26 the dispute came to an end and the garrison of police was withdrawn.

The charges for the pay and expenses of the billeted police, ascertained in accordance with the terms of the requisition, amounted to 2200*l.* 11*s.* 10*d.*, and payment of that sum was demanded of the appellants, but refused; and thereupon the Glamorganshire County Council, with the Standing Joint Committee and the Chief Constable, brought this action against the appellants claiming payment of that amount. The appellants by their defence did not contest the correctness of the charges claimed, but pleaded that the police officers in respect of whom the charge was made were supplied for the purpose of carrying out the legal duties and obligations of the plaintiffs, which included the prevention of riot and violence and the protection of the appellants' servants and property against the danger or apprehended danger of injury by reason of riots, violence or tumults, and accordingly that there was no consideration for the agreement to pay, which was signed under compulsion, and they counterclaimed for the expenses of housing and maintaining the police, amounting to 1330*l.* 4*s.*

The action was heard by the late Bailhache J., who gave judgment for the plaintiffs (the respondents) on the claim and counterclaim with costs; and on appeal this judgment was affirmed by a majority of the Court of Appeal (Bankes and Scrutton L.JJ., Atkin L.J. dissenting). Hence the present appeal.

Upon the argument of the appeal, two points were raised. First, it was argued that, when a subject has need of police protection and has done nothing to increase the risk, he is entitled to protection without payment and an agreement to pay is without consideration and contrary to public policy. Secondly, it was said, following a suggestion made in the Court of Appeal, that on general principles the police authorities are not entitled, except in the cases specifically provided for by statute, to make a charge for police services. It is convenient to deal first with the latter and more general contention.

My Lords, the practice by which police authorities make a charge for "special services," that is to say, for services rendered outside the scope of their obligations, has been established for upwards of sixty years and is constantly followed by every police authority in the country with the approval of the Secretary of State; and it is difficult to understand on what grounds it should now be treated as illegal. No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right. This was laid down by Pickford L.J. in the case of *Glamorganshire Coal Co.* v. *Glamorganshire Standing Joint Committee* (1) in the following terms: "If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense

(1) [1916] 2 K. B. 206, 229.

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in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty." With this statement of the law I entirely agree, and I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force, should be firmly discountenanced by the Courts. But it has always been recognized that, where individuals desire that services of a special kind which, though not within the obligations of a police authority, can most effectively be rendered by them, should be performed by members of the police force, the police authorities may (to use an expression which is found in the Police Pensions Act, 1890) "lend" the services of constables for that purpose in consideration of payment. Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations. Of course no such lending could possibly take place if the constables were required elsewhere for the preservation of order; but (as Bankes L.J. pointed out) an effective police force requires a margin of reserve strength in order to deal with emergencies, and to employ that margin of reserve, when not otherwise required, on special police service for payment is to the advantage both of the persons utilizing their services and of the public who are thereby relieved from some part of the police charges. Atkin L.J. put the contrary view in the form of a dilemma when he said (1): "Either they were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or, which no one suggests, they were

(1) This passage is quoted from the Appendix.

at the request of an individual doing something which it was not their duty to do, in which case it seems to me both public policy and s. 10 of the County Police Act, 1839, make the contract illegal and void." With great respect to the learned Lord Justice I am disposed to think that this reasoning rests on an ambiguous use of the word "duty." There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance. I do not understand the reference in the above passage to s. 10 of the Act of 1839.

The above view of the law is in accordance with certain passages in the judgments of Phillimore and Pickford L.JJ. in the previous Glamorganshire case cited above (1), but in that case the point did not actually arise. The argument also derives considerable support from the statutes dealing with the police. By the Police Act, 1838 (1 & 2 Vict. c. 80), it was provided that when the appointment of special constables had been occasioned by the behaviour or by reasonable apprehension of the behaviour of the persons employed upon any railway, canal or other public work made or carried on under the authority of Parliament, the justices might make orders upon the company making or carrying on such railway, canal or other public work for the payment to such special constables of reasonable allowances for their trouble, loss of time, and expenses. By the County Police Act, 1840 (3 & 4 Vict. c. 88, s. 19), it was enacted that it should be lawful for the chief constable of any county with the approval of the justices in quarter session on an application of any person showing the necessity thereof to appoint and cause to be sworn in any additional number of constables at the charge of the person making such application, but subject to the orders of the chief constable and for such time as he should think fit. It is true that the provisions of this section are confined to the appointment of "additional" constables; but it would seem somewhat absurd to require that, if in any case where constables are required for special duty there are

(1) [1916] 2 K. B. 228–9; 114 L. T. 718–728.

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members of the existing force who can be spared for the purpose, the services of those constables shall not be utilized but additional constables shall be appointed. And by the Police Act, 1890 (53 & 54 Vict. c. 45, s. 16), it was provided that there should be carried to the pension fund of every police force among other sums "(*e*) such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authority may consider to be a fair contribution to the pension fund in respect of those constables." No doubt the above provision of the Act of 1890 was repealed by the Police Pensions Act, 1921; but that repeal was rendered necessary by reason of the fact that by s. 22 of that Act all pensions were directed to be paid out of the police fund and the pensions funds were abolished, and the repeal does not detract from the significance of the fact that by the terms of the Act of 1890 the lending of the services of constables in consideration of payment was expressly recognized by the Legislature. I find it difficult to believe that if the Legislature had considered the practice of lending constables for special duty, which in the year 1890 was of daily occurrence, to be against public policy, it would have provided for the application of payments received in consideration of such lending to pension purposes; and it appears to me that this statutory recognition of the practice in question affords a strong argument in favour of its legality.

I conclude, therefore, that the practice of lending constables for special duty in consideration of payment is not illegal or against public policy; and I pass to the second question—namely, whether in this particular case the lending of the seventy constables to be billeted in the appellants' colliery was a legitimate application of the principle. In this connection I think it important to bear in mind exactly what it was that the learned trial judge had to decide. It was no part of his duty to say—nor did he purport to say—whether in his judgment the billeting of the seventy men at the colliery was necessary for the prevention of violence or the protection of the mines from criminal injury. The duty of

determining such questions is cast by law, not upon the Courts after the event, but upon the police authorities at the time when the decision has to be taken; and a Court which attempted to review such a decision from the point of view of its wisdom or prudence would (I think) be exceeding its proper functions. The question for the Court was whether on July 9, 1921, the police authorities, acting reasonably and in good faith, considered a police garrison at the colliery necessary for the protection of life and property from violence, or, in other words, whether the decision of the chief constable in refusing special protection unless paid for was such a decision as a man in his position and with his duties could reasonably take. If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it, for that would be to exact a payment for the performance of a duty which they clearly owed to the appellants and their servants; but if they thought the garrison a superfluity and only acceded to Mr. James' request with a view to meeting his wishes, then in my opinion they were entitled to treat the garrison duty as special duty and to charge for it. Now, upon this point the Divisional Superintendent Colonel Smith, who was a highly experienced officer, gave specific and detailed evidence; and the learned judge having seen him in the witness box and heard his examination and cross-examination accepted his evidence upon the point, as the following extract from the judgment shows: "Colonel Smith says that if the matter had been left entirely to him without this requisition, he would have protected this colliery, and he would have protected it amply, but in quite a different way, and I accept his evidence that that is so. He would not have sent this garrison there, and in my judgment, while not desiring for a moment to suggest that it was not the bounden duty of the county council to protect this colliery, and not for one moment suggesting that the performing of a legal duty will support a promise to pay, I have come to the conclusion that when a colliery company or an individual requisitions

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police protection of a special character for a particular purpose, he must pay for it, and he must pay for it whether he makes a contract to pay or whether he does not—a promise to pay would be implied under those circumstances. In this case, of course, there is an express promise, and in my judgment this promise is not without consideration and must be fulfilled."

Upon this point Sir John Simon in his powerful argument for the appellants contended that the true inference to be drawn from the evidence was that the police authority, having a discretion to elect between protecting the collieries (which admittedly required protection in some form) by means of the "mobile body" to which Colonel Smith referred or by means of a garrison, chose the latter alternative in consideration of payment, and that they could not so (as he put it) "sell their discretion." Upon the evidence, I do not think that they did anything of the kind. Colonel Smith said clearly that the police garrison was no part of his scheme of protection and did not help him in his scheme at all; that he had an ample force by which to protect the collieries from outside and was well able to cope with the situation. It does not appear that the provision of the garrison, who were brought in from distant parts of the county, relieved the force on the spot from any of their duties, or that the local force was reduced in consequence; and I think that the true inference is that the garrison formed an additional and not a substituted or alternative means of protection.

There is another argument to be noticed. It was said that if the police garrison had not been provided the "safety men" would not have attended to work the pumps and the mines would have been flooded, and from this it is inferred that the garrison was necessary for the protection of the appellants' property. I think that there was evidence to that effect, but it does not appear to me to follow that it was the duty of the police authority to provide the garrison. They were no doubt bound to protect the "safety men" from violence, but it was not for the safety men to decide the form in which that protection should be given; and if they declined to safeguard the collieries from flooding unless protection

was given in a particular form which the police authorities thought unnecessary, it was for the owners of the collieries and not for the police to overcome their reluctance.

Upon the whole matter, I have come to the conclusion that the decision of the learned trial judge and of the Court of Appeal was right, and that the appellants, who deliberately entered into an agreement to pay for the services and maintenance of the police garrison and did not dispute their liability until they had had the benefit of those services for a period of nearly two months, cannot now repudiate their agreement upon any of the grounds put forward. In my opinion, therefore, this appeal fails and should be dismissed with costs.

VISCOUNT FINLAY. My Lords, the appellants are the owners of collieries on the Garngoch Common in the county of Glamorgan. In 1921 there was a national coal strike which began on April 1 and lasted till July 4, at which date work was generally resumed. The men at the appellants' collieries were, however, dissatisfied with the terms of settlement and refused to resume work. In these collieries over 1000 men had been employed, and they remained idle until September 4, 1921. The "safety men," as they are called, who were engaged in working the pumps on which the preservation of the mine from flooding depended, remained at work. If the working of the pumps had been stopped the mine in the course of a few days would have been most seriously damaged by the accumulation of water. The strikers endeavoured to get these "safety men" to join in the strike, the effect of which would have been that in three or four days the mine would have been drowned out. Under these circumstances the agent of the owners, Mr. Alfred James, went to the Gowerton Police Station to arrange with the superintendent, Colonel Smith, for police protection. He asked that an adequate force of police should be billeted in the houses in the immediate vicinity of the collieries. Colonel Smith thought that protection would be best afforded by a flying column moving from point to point as required, but Mr. Alfred James insisted that a "garrison" near the

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mines should be provided, and Colonel Smith acquiesced. Mr. James in his evidence described what ensued as follows (Appendix, p. 35) :—

"*Q.* Did he then tell you something about a form ?

"*A.* Yes.

"*Q.* What did he say exactly about the form ?

"*A.* As near as I remember he said : 'You will of course have to sign a form of requisition.' I said : 'Yes—that is the usual procedure in matters of this description'—and he told me it was, so I said : 'All right, I will sign the form.' "

The form was accordingly signed. It is headed : "Form of Requisition for Special Services of Police." It stated that certain men, seventy in all, were required for special duty at the Garngoch and Cape Collieries on the occasion of a strike from 6 P.M. on July 9. The form concluded—

"I hereby guarantee payment on the conditions specified in Clause 'C' in the Second Schedule to this form."

This was signed by Mr. James and addressed to the chief constable. The schedule stated the terms as to payment, accommodation and food.

The seventy men arrived on the evening of the same day. The safety men remained at work, and it was admitted at the trial that police protection in some shape or form was required. No pressure was put upon Mr. James to sign the requisition ; as his evidence shows, he was prepared to sign it and knew that it was usual in such cases.

The action in this case was brought to recover the amount due on the terms of the requisition.

The colliery owners repudiated liability on the grounds that there was no consideration for the promise to pay for the police protection and that such an agreement was against public policy. The case was tried by Bailhache J. and he entered judgment for the plaintiffs, saying : "There is an obligation on the police to afford efficient protection, but if an individual asks for special protection in a particular form, for the special protection so asked for in that particular form, the individual must pay."

This decision was affirmed by a majority on the appeal

(Bankes and Scrutton L.JJ.; Atkin L.J. dissenting). The colliery owners now appeal and ask that judgment should be entered for them.

It appears to me that there is nothing in the first point made for the colliery owners that there was no consideration for the promise. It is clear that there was abundant consideration. The police authorities thought that it would be best to give protection by means of a flying column of police, but the colliery owners wanted the "garrison" and promised to pay for it if it was sent. I pass at once to the second objection made by the colliery owners, on which we have had a prolonged argument.

A great number of cases have been cited to us in which it has been held that fees extorted colore officii must be returned. These authorities seem to me to have no application to the present case.

There is no doubt that it is the duty of the police to give adequate protection to all persons and to their property. In discharging this duty those in control of the police must exercise their judgment as to the manner in which that protection should be afforded. If a particular person desires protection of a special sort and the police can give this without interfering with the discharge of other duties elsewhere, it is difficult to see on what ground of public policy it should be illegal that a charge should be made in respect of special protection. The police must, of course, have a certain margin of strength to draw upon as from time to time occasion may arise, and for this purpose it is essential to have at the disposal of the authorities a force in excess of the bare amount which would in normal circumstances be sufficient for the discharge of their duties. For a long series of years it has been the practice to supply special police protection on the promise of payment. There has been a great deal of legislation about the police, but no attempt has ever been made to interfere with this practice. On the contrary it has been recognized and regulated by the authorities. I may refer in illustration to the memorandum from the Home Office, dated January, 1892, as to receipts in respect of the services

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of constables lent to private employers. Of course, if it were illegal to take such payments no amount of sanction by Government Departments would legalize what was against the law. But the fact that the Home Office has regulated such payments goes a long way to show that there is nothing illegal about them. We have not been furnished with any substantial argument on the ground of public policy against such payments. Why should not the reserve strength of the police be used in this way on the terms that those who desire such special protection should make payment for it in aid of the expenses of maintaining the force, and so to that extent relieving the ratepayer ? It was suggested that such a practice would enable those who could afford to pay for it to get special police protection which would not be given to their poorer neighbours. The police authorities may be trusted to see that such special service is never to be allowed in cases where it would interfere with the other duties of the force. I can see no ground of public policy on which employers should not make some contribution to the special cost of police required on emergency for the protection of their works.

I have referred to the fact that the Legislature has never interfered with this practice, the existence of which for eighty years or upwards has been known to every one. But the Legislature has actually made provision as to the application of the moneys to be derived from such payments. The Police Act, 1890 (53 & 54 Vict. c. 45), by s. 16, sub-s. 1, made the following provisions : " There shall be a pension fund of every police force and there shall be carried to that fund . . . . (*e*) Such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authorities may consider to be a fair contribution to the pension fund in respect of these constables." The subsequent repeal of this Act as no longer necessary does not affect the inference to be drawn from this recognition of the practice. It was indeed a recognition that the practice was legal, as it cannot be supposed that Parliament would have directed such application of payments which were in themselves illegal.

A much earlier statute, the County Police Act, 1840 (3 & 4 Vict. c. 88), by s. 19, makes provision for the appointing and swearing in of special constables "at the charge of the person or persons by whom the application shall be made," such special constables to be discontinued on the request of those who have applied for their appointment. This enactment seems to me to destroy the contention of the appellants that there is some legal principle which makes it illegal to pay for special police assistance.

The case for the appellants is summarized in a sentence of the dissenting judgment of Atkin L.J. as follows (Appendix, p. 76): "Either they were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or, which no one suggests, they were at the request of an individual doing something which it was not their duty to do, in which case it seems to me both public policy and s. 10 of the County Police Act, 1839, make the contract illegal and void." I think that this argument, like most arguments put in the form of a dilemma, fails to cover the whole ground. There was no duty on the police to give the special protection asked for, but it does not follow that it was their duty not to give it. Sect. 10 of the Act of 1839 seems to me to have no relevance to the circumstances of the present case, as it merely prohibits constables from taking for hire or gain work other than in the execution of their duties under the Act. It has no reference to special protection given by the police authorities to particular persons and the work done by the constables in that respect under their orders.

It would be useless to go through the cases in which exactions by officials of fees to which they have no right have been treated as illegal. The question here is an entirely different one. It is simply whether a charge may be made for special police protection desired by a particular person for which he is willing to pay and which the police are in a position to render without interfering with their ordinary duties. Beyond all question it is the duty of the police to give protection to the persons and property of all His Majesty's subjects. The police must never be taken off for special duty so as to

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withdraw such protection as is wanted elsewhere. The fact that the system has so long existed without giving rise to any complaint that it interferes with the ordinary duties of the police is the best evidence that the objections to the practice are not real. These objections are indeed merely theoretical. The practice has existed for nearly a century and has not been attended by any of the mischiefs which it has been suggested might follow. If a particular person gets special police protection in a particular form on his promise to pay for it, he is bound by his contract legally as well as morally.

In my opinion this appeal must be dismissed with costs.

LORD SHAW OF DUNFERMLINE (read by LORD BLANESBURGH). My Lords, I concur. I hold it to be established that the position of the safety men in this mine was such as to justify the special attention of the police authority being called to their protection. As to the powers, position and duty of the police I venture to quote on this matter the judgment of Pickford L.J. in *Glamorgan Coal Co.* v. *Glamorganshire Standing Joint Committee.* (1) I respectfully and entirely agree with that judgment. The learned judge says of the police authority that "they have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly."

The circumstances of the situation which brought about a just call for police protection in the present instance were that in addition to the peril of the safety men there was, of course, a serious danger to property, for the reason that the stoppage of or impediment to pumping might flood the mines.

(1) [1916] 2 K. B. 206, 229.

The interview accordingly between Colonel Smith, the police superintendent, and Mr. James on this subject was very natural; it was also, I think, an interview creditable to both parties. In the view which I take of their attitude and action I am of opinion that Colonel Smith fully recognized the duties to which I have alluded, and was of opinion that he could sufficiently and properly carry out these duties by a thin shield of police round the pits, with such mobility of the general force as would permit of the special protection of the homes and families of the safety men if these should also be attacked. On the other hand, I think that Mr. James was honestly of opinion that that would not be enough, and held this opinion so strongly that he willingly agreed that if a garrison or a resident force were furnished this would be upon the terms of that force being paid for.

In a conflict of view of that description I think that naturally Courts of Law should, to begin with, pay a considerable deference to the experience and view of the authority set up by law for the preservation of peace and order. This view, however, does not go very far, if it is confronted with the careful and experienced opinion of a man like Mr. James, who knew the locality, the industrial position, and the personnel. On the question accordingly whether the police did require the special force for due police protection in the circumstances and cannot therefore charge for providing that force I am driven to consider the verdict upon the whole evidence which was formed by the learned Bailhache J. at the trial. The issue tried was whether the installation of a garrison or resident police force at the colliery was what may be called a police necessity. The learned judge puts his verdict upon that topic in this way: "Colonel Smith says that if the matter had been left entirely to him without this requisition" (that is, the requisition for a garrison) "he would have protected this colliery, and he would have protected it amply, but in quite a different way," i.e., by the thin shield already referred to; and the learned judge adds: "and I accept his evidence that this is so."

The majority of their Lordships in the Court of Appeal

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agree with that opinion. I cannot see my way to differ from it. I accordingly hold that the result of the evidence as found is that the safety of the mine, the object in view, would have been attained without the extra force, which was agreed to be paid for, being called in.

But a question remains—one carefully and anxiously considered in the opinion of Atkin L.J.—whether calling in such a force to act as an additional precaution, and to make assurance of safety doubly sure, is outside of the sphere of the duty committed to the police. The statutes have been cited by the noble Viscount on the Woolsack, and by my noble and learned friend who has just resumed his seat. A perusal of these, taken along with the practice to which my colleagues have alluded, convinces me that there are functions of a surplus or extra character to which available policemen may be detailed on special terms, and that the moneys obtained for such services have been recognized by the Legislature to be paid over in a particular manner, whether by way of assistance to a police pension fund or in the relief of general taxation. The question, accordingly, is whether in exercising the power to act in this fashion the police authority has gone beyond the sphere of its duty. I cannot see my way to hold that it has. That authority has acted intra vires.

I desire, however, to add that the whole of this part of the case depends upon the necessity for a special force being, in a reasonable sense, established. If that is done I clearly am of opinion that no charge can be exacted from a private citizen for the performance of a public duty. Furthermore, I would also add that, on the assumption that a payment is made to induce or secure that the public authority will perform such a duty, moneys paid under such a bargain are recoverable by the private citizen on the double ground, first, that it is against public policy that the performance of public duty shall be a matter of private purchase, and second, that a promise or agreement to pay, accepted from a citizen in times of nervous alarm or anxiety, fails in legality on the ground of duress, and sums paid under it must be restored.

In the present case, however, as I have explained, the

agreement for payment must be supported, because it was for something which, although within the power of the police to give, could not be declared as a protection proved to be necessary for the reasonable demands of the occasion.

LORD CARSON. My Lords, I am of opinion that this appeal should be allowed. The questions raised are of great public importance, and as the decision I have come to is at variance with that of the three noble and learned Lords who have already addressed this House, I feel bound to state my reasons for the conclusions at which I have arrived at some length. Before examining the facts of the present case it is necessary to make it perfectly clear what the duties of the police as preservers of the King's peace are in cases where either the person or the property of a subject is criminally assailed or threatened by the action of any other person or persons. I do not think, my Lords, that upon this point there is any difference of opinion. I notice that the Lord Chancellor, in the speech which he has just read, has stated as follows: "No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace for preventing crime or protecting property from criminal injury and the public who pay for this protection through the rates and taxes cannot lawfully be called upon to make a further payment for that which is their right."

He quotes with approval the statement made by Pickford L.J. in the case of *Glamorganshire Coal Co.* v. *Glamorganshire Standing Committee* (1), and he adds: "With this statement of the law I entirely agree and I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force should be firmly discountenanced by the Courts." I should like also to add the declaration made in the same case by Phillimore L.J.: "Nor can I pass over the contention frequently made in the course of the proceedings, that it was the duty of the plaintiffs to protect themselves against

(1) [1916] 2 K. B. 206, 226, 229, 242.

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rioters. Such a contention strikes at the basis of all civilised society and logically leads to private war. The subject pays rates and taxes to ensure himself protection against domestic as well as foreign foes, and it is the duty of the Government to provide him with it."

Bray J., in the same case, states: "The real reason for the refusal of the county council to pay these claims seems to have been that they thought that the colliery proprietors ought to pay for having the lives of their employees and their property protected. The colliery proprietors have to pay rates like other persons, and have a right to have the same protection as other persons living and owning property in the county."

If I might with respect offer any criticism on the Lord Chancellor's statement, I would myself prefer to lay down that it is the duty of the police to take all steps that are necessary for the purposes mentioned by the Lord Chancellor.

I should like to supplement these statements by one further observation—namely, that it is not in the power of the executive through the Secretary of State or otherwise to limit the rights of the subject in obtaining such protection for life and property, and that any attempt to do so would be absolutely unconstitutional and illegal. A perusal of the judgments of the case of *Miller* v. *Knox* (1), a case in your Lordships' House though not upon this exact point, affords very useful commentary upon the right of the executive to refuse assistance in cases where it is necessary to apply for the assistance of the police. My Lords, it is necessary therefore to examine carefully the facts of the present case and to ascertain whether, under the circumstances, the steps taken to protect the safety men and thus avoid the drowning of the colliery, for which the appellants are asked to pay, were outside the proper and necessary duties of the police which the appellants were entitled to have performed under the law to which I have just referred.

My Lords, it was admitted at the trial that at the time when the requisition relied upon as the basis of this action

(1) (1838) 4 Bing. N. C. 574.

was signed by Mr. James police protection in some shape or form was required to protect the safety men, but I cannot help thinking that it was a pity that the learned judge, on obtaining such an admission, prevented further evidence being given of the exact state of affairs which rendered such protection necessary. There is, however, a considerable amount of information to be gathered from the records and the evidence as to what the exact state of affairs was. It appears that on July 7, 1921, 700 strikers went to the collieries in order to compel the safety men to abstain from work, and that in consequence of this interference with the safety men the appellants' agent, Mr. James, interviewed Police Inspector Nicholls and informed him of the danger to the pits and to the safety men, and asked for police protection. On the next day, July 8, picketing was actively continued at the collieries and the approaches thereto. Large crowds of hostile workmen assembled near the collieries and interfered with the safety men. Instead of the normal number of safety men who were required to keep the pumps going, only one safety man attended work at the No. 1 Colliery, and the workmen's committee informed the said Mr. James that they were going to get all the safety men out. It was on the afternoon of this day that the safety men held a meeting at which they resolved that, owing to interference by the strikers and to the insufficiency of the police protection, they could not continue at work.

On Saturday, July 9, none of the safety men came to work at any of the collieries and the fires had to be drawn, with the result that if this continued the colliery would have been drowned out in a few days. It was in this condition of affairs that Mr. James pointed out to Superintendent Smith that it would be necessary to have police billeted at the collieries if the safety men were to be given adequate protection to enable them to continue at work. There was some discussion as to the number of police required, and eventually Superintendent Smith said that seventy police officers would be sufficient, and, as a condition of sending the seventy police, procured the signature of Mr. James to the requisition upon which

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this action is founded. On the same day the seventy police came to the collieries for duty and some of them remained at the collieries until the strike ended on August 26, 1921. It is to be specially noted that this action was not taken until the safety men had left, owing, as they said, to the want of sufficient police protection.

A few days after the arrival of the police the safety men returned to the colliery, where they also were billeted, and maintained the colliery in safety until the strike was ended and work was resumed.

An examination of the police journals which were put in evidence at the trial throws further light upon the matter. It states, under the entries of July 10, 1921, that "the men were afraid to remain in consequence of the attitude of the workmen, and, fearing their homes would be wrecked, they left the collieries, hence the importing of extra police for protection and restarting the fire at the boiler." It further shows the steps taken by Smith to co-operate with the men at the colliery premises and under date Tuesday, July 12, 1921, there is the following entry: "Col. F. W. Smith, Inspector Nicholls and 15 men from 'H' Division arrived at the colliery premises at 4 A.M. The whole of the men kept on reserve at the colliery premises in consequence of a meeting announced to be held at Cadle Common, and in the event of the colliers deciding to march on the colliery in a body with a view to endeavouring to get the imported stokers to discontinue the work." And as late as July 29 there is an entry as follows: "It has been reported locally that at the meeting held at the Workmen's Hall, Treboath, it was decided not to allow the management to have any men to work the pumps after the holidays. This means that if the officials decide to come to work at the colliery they will be only able to work under police protection, as feeling ran very high in that locality against the employment of safety men. The following officials employed at the colliery were taken home under police protection at 10.45 P.M. . . . ."

It is instructive also to note that in a letter dated May 29, 1923, from the chief constable of the county of Glamorgan

to the Under-Secretary of State at the Home Office, the following statements were made: "A colliery company, having signed agreements to employ some constables of this force on their private premises so as to induce the workmen out on strike to come back to work, have now refused to pay the county for the services of the constables on the ground that it is illegal. . . . . In this particular case our position is a very strong one. We sent the men employed on special duty from the most distant divisions in the county, thus keeping nearer divisions at hand as reserves. We also put a strong force of extra men at the county's expense and also from the most distant division in the strike area, while a military officer came down to examine the position with a view to bringing military help there if necessary. The result of these precautions was that the men went back to their work and the strike, which had been hanging on for a long time, terminated without any disorder."

This letter gives some idea of the necessity for and the success of placing "the garrison" in the colliery. On the other hand, Superintendent Smith stated, in his evidence, when asked what was his view as to the necessity of having these seventy men at the pits during this time, that it was against his advice, because he was able to protect, and had made arrangements to protect, the colliery without them. He also said that he preferred a mobile body in his own hands that he could move about, that the seventy men in the garrison did not help him in his scheme at all and that they were not part of his scheme at any time. The following questions and answers are very material. These are questions to Colonel Smith :—

"*Q.* You recognise that it was necessary to have the safety men at work if the property was not to be destroyed ?

"*A.* Some one must work the pumps, yes.

"*Q.* Do you think that the safety men would have remained at work if there had not been police protection always there ?

"*A.* I do not think they would, they were over anxious in my opinion.

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"*Q.* In fact, if you had not had men always there the collieries would have drowned out?

"*A.* Not at all.

"*Q.* Do you mean that the collieries do not drown out so soon or what is it?

"*A.* I am certain that with the men in my district, without any importation at all, we could have protected any men whom Mr. James could have got to work the pumps. I quite understand that the pumps must be worked and we could have protected them, but he would have what he desired and he did have it.

"*Q.* But you agreed that the safety men would not have remained without the police protection.

"*A.* My opinion is that they were very nervous. I know their temperament very well; they were unduly nervous because there never had been trouble at that group of pits for twenty-five years."

The learned judge who tried the case stated that he accepted the evidence of Smith that if the matter had been left to him without the said requisition he would have protected the appellants' collieries and would have protected them amply but in quite a different way.

Bankes L.J. felt bound to accept the trial judge's view, and Scrutton L.J. stated: "I am not satisfied he was wrong, and I am impressed by the difficulties of the Courts interfering with the judgment of the police authorities when in fact no danger has occurred." I am inclined to think the word "danger" is a misprint for "damage."

My Lords, having examined the evidence with great care I cannot myself come to any other conclusion but that the supplying of the garrison, as it has been called, under the circumstances in this case was an essential and necessary part of the protection which the police were bound to supply, both to the owners of the colliery and to the men who had to leave their work because of the want of protection and who wanted to work there if they were left unmolested, and in my opinion without such protection it is reasonably probable that the appellants would have been unable to procure the

services of the safety men and thus save the colliery from drowning.

Under these circumstances I find it impossible to come to the conclusion that anything was done by the police which was outside or beyond their obligations to the appellants in accordance with the law as laid down in the quotations which I have already made. My Lords, it is said by the Lord Chancellor that these were services of a "special kind" which were not within the obligations of a police authority and were of such a character as entitled the police authority to lend the services of constables for that purpose in consideration of payment. Having regard to what I said I cannot come to that conclusion. I notice that Bankes L.J. treats the matter in this way. He says: "If people for their own pleasure, or for their own profit, or because, in special cases, of their peculiar circumstances, desire special police protection, I see no reason why they should not be called upon to pay for it."

My Lords, I would find it impossible to hold that the facts of the present case could possibly be brought within this formula.

Scrutton L.J. says: "It does not appear to me to prohibit the police authorities from asking people who desire police protection which is rather a luxury than a reasonable necessity, to pay for it."

I cannot, on the facts of this case, myself see that the demands of the colliery owners were for anything in the nature of a luxury. The circumstances speak for themselves, and we must in the calmer atmosphere of this House be quite sure we realize the facts as existing at the time. The safety men had left the colliery under compulsion, owing, as they said themselves, to want of police protection, and it is not to my mind any justification for not protecting them that, to use the words of Superintendent Smith, they were very nervous or unduly nervous. When the protection in the form in which it was asked for had been granted they returned to work, and I cannot help thinking that it was in this way a great disaster was avoided. My Lords, I find great difficulty

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in trying to define "special services" in a case where there is actually being carried on an open invasion of the rights of subjects and when riot and violence threaten the destruction of property of such individuals and the right to work of other individuals, and indeed it would, I think, render the law difficult to carry out under similar circumstances if those demanding protection were to be told at any moment in the course of such attacks that the limit of protection had been reached unless they were rich enough to buy further protection by agreeing to pay a sum which in this case amounted to some 3000*l.* to the police authorities.

The Lord Chancellor has referred to other instances of "lending" or hiring out constables, e.g., on the occasions of large gatherings in and outside private premises, as on the occasion of weddings, athletic or boxing contests, etc. My Lords, with great respect, I cannot see how any useful comparison can be made between arrangements of that kind freely entered into without any relation to violence and acts of terrorism in progress and which the police are bound to put an end to and the case such as the present, where it required every possible effort to save the colliery from destruction. As well might one compare a case where the burglar is already in possession of a person's house to one where there is no reasonable likelihood of any such terrifying incident.

My Lords, where are we to get a definition or how are we to give any guide as to what are "special services" in such cases? Who is to lay down what are "special services" and what are ordinary services in relation to protection of life and property? Can the rich man buy greater protection than the poor man; or are all to be equally entitled to protection in the eye of the law?

I observe that in the letter to which I have already referred it is said there are regulations for special duty laid down by the Home Office, although they could not find the original authority from the Home Office for authorizing a police force to charge private individuals for special services of police. The Home Office has no authority to lay

down when the police are to charge for their services and when they are not in such circumstances as arose in the present case.

When asked by the chief constable of Glamorgan to supply an answer to the assertion by the appellants that the charges sued for in this case were illegal, I notice that the Secretary of State justifies the charge by stating "that the principle of the employment of county constables at private cost is as established by s. 19 of the Police Act of 1840." As he himself states in the letter, that section only has reference to swearing in additional constables at the expense of an applicant and has no relation to the present state of affairs, when much larger forces of police are maintained and consequently a greater burthen thrown upon the ratepayer. However that may be, the section can have no reference to such a case as the present, as no such additional constables were appointed.

It is said by your Lordships who have preceded me that it is within the powers of the superintendent to himself say when a charge is to be made and when it is not, and indeed the trial judge laid it down that without any special contract the person who asks for the services may be charged upon an implied contract. My Lords, I cannot think that that can be a correct application of the law. If it were so, the subject would appear to me to have no means whatever of challenging a breach of duty upon the part of the police, nor do I see how the dictum of the Lord Chancellor, which I have already quoted, that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force should be firmly discountenanced by the Courts, can be carried out. When the emergency arises, the subject who asks for protection would be entirely at the mercy of the police if payment were demanded. He would not be contracting as a free agent, as, taking for example the present case, he would have no option, and indeed in this case he was given no option but to enter into a contract of payment or lose his property. Moreover, the police on such an occasion would, in such a case, be demanding

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payment under instructions and regulations which had been already laid down by the executive power.

Having arrived at the conclusion of fact which I have already stated, I think I am bound to come to the conclusion that the requisition and promise to pay signed by the appellants and sued upon in this case was without consideration. It was a promise made under pressure of the circumstances to pay for services which the appellant was entitled to have rendered without such payment. It is unnecessary to consider the further point that has been contended for—namely, that in every case the practice which has existed of hiring out the police to those who are able to pay is illegal, but I am prepared to hold that in such cases it is necessary for the police authorities to justify a demand for payment in accordance with the principles I have already laid down. For these reasons, as I have already stated, I think this appeal should be allowed.

LORD BLANESBURGH. My Lords, during the national coal strike which was settled on July 4, 1921, the safety men at the collieries throughout the country were left undisturbed. The responsible leaders of that strike, shrinking, as they rightly as well as wisely did, from the wantonness of wrecking the mines on which the livelihood of the miners themselves ultimately depended, refused to countenance the policy of withdrawing the safety men from their posts, when effective pressure short of such a step could be brought to bear upon the employers.

In the sectional strike at the appellants' collieries which persisted after the national strike had ended, the ability of the strikers to impose their will upon the owners was obviously less compelling, and, very likely for that reason, the withdrawal of the safety men became apparently very soon an objective of the strike. On July 7, after a demonstration in front of one of the appellants' collieries, a deputation of the strikers sought an interview with the safety men still at work there and pressed them to come out in sympathy. Their reply was that their own association had decided that work

was to continue and they were resolved to remain. As the men were not to be persuaded, it was necessary to determine whether they were to be coerced. Accordingly a mass meeting of the strikers was held later in that afternoon; and it was then decided that all the safety men should be compelled to come out. On the next morning this resolve, which had doubtless already become notorious in the district, was communicated by the workmen's committee to the appellants' manager, Mr. James, and he, when he sought to reason with the committee, was informed that the matter was no longer one for discussion and that the decision was final.

This decision I should have thought changed the whole character of the strike, although it does not seem so to have struck the police superintendent, Colonel Smith, who apparently assumed that the orderly character of the national strike would continue to be preserved. What had happened, however, was that a campaign which hitherto had been constitutional and responsible had become one charged with the possibility of serious disorder. Indications of the change were soon apparent. Atkin L.J. gives one in his judgment. On Friday, July 8, the superintendent of police attending at Tirdonken, an adjoining colliery affected also by the strike, with thirty-four extra men had met a crowd of 800 strong led by three rows of women carrying babies in the front rank. The crowd was hostile to the management and police; and a new attitude of menace was assumed towards the safety men. As early as the afternoon of the 7th, the winding engine man was stopped by strikers on the common and prevented from reaching the colliery, and on the next morning one of the safety men was pulled off his bicycle on his way to work and hostile demonstrations were being made outside their homes.

All this had, and very naturally, an immediate effect upon these men. On the morning of the 8th one only turned out; on the 9th none of them appeared at all. During the afternoon of the 8th they had as a body met and decided to cease work, and Mr. James was informed that they had thus decided because of the severity of the pressure brought to

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bear upon them and the insufficiency of the police protection afforded them. It was conveyed, however, to him that with adequate protection they would be willing to return. Now, the police protection which they regarded as insufficient had been in operation on the 7th and 8th. Their lack of confidence in it, confirmed possibly by the events of the 8th, had doubtless contributed to the resolution of that afternoon, and was the explanation of their complete absence from work on the 9th. The form of protection so far in force and to which Colonel Smith remained wedded as being best in the circumstances, had as its main feature the provision of what he termed a mobile body of police with scouts and telephone arrangements, whereby the column could always arrive at a threatened colliery in advance of any crowd. The safety men were not impressed. Like some people in other circumstances, they preferred cash to credit. The support of the visible presence of the police while they were working the pumps seemed to them to be essential. They were, perhaps, less confident in the complete mobility of the Colonel's column than he was. Scouts are sometimes at fault; telephones do not always work; tyres puncture even when no strikes are on. All the mischief might be done before any column arrived, and not necessarily by crowds. Mr. James put their view in his evidence. He told Colonel Smith on the 9th, he said, that it was hopeless to try and keep the safety men at work with the local police dodging about in motor cars from one place to another. Accordingly, at his instance and on terms which are the subject of this appeal, the following protective scheme was ultimately adopted. A garrison of police was located at each of the appellants' three collieries: the safety men were billeted there: and their homes were protected by the outside police. These arrangements, when completed, were entirely successful. The reassured safety men returned to work, and they and the collieries were kept in safety till the strike was ended.

In the course of his evidence Mr. James was asked: "In your opinion, if you had not had this force of police at the collieries would you have been able to get your safety men

to work ? " And his answer, which is neither cross-examined to nor contradicted by any other witness, was " No, absolutely not."

My Lords, it is unfortunate that owing to the intervention of the learned judge, the appellants' witnesses on this part of the case were not fully heard. But I cannot doubt, from a survey of the evidence which was adduced, that, almost as a matter of common consent, this statement of Mr. James's expressed the actual situation.

And there is no suggestion, either in the police reports at the time or anywhere else, that the requirements of the safety men were unreasonable or their conduct unworthy. As Atkin L.J. says, it is perhaps easier to be heroic in London years after the occurrence than at Gorseinon in July, 1921. The men exhibited notable moral courage in returning to work at all, and it must be remembered that although they had in preserving the mines the same real interest as the strikers they were under no higher duty in that matter than any other of His Majesty's subjects. Why, then, should any exceptional exhibition of physical hardihood be expected or required of them ?

What, however, is more immediately relevant is that without a force of police at the collieries the appellants could not have induced these safety men to take the place of the marine stokers who were unequal to the work, and there is no suggestion that in the emergency any other men were obtainable on any terms at all. No laxity or default of any kind in this matter is attributed by anybody to the appellants. In these circumstances the sufficiency of the police protection for their collieries must, I think, be determined from the standpoint indicated by the learned judge, when he says that it was of course very necessary that the safety men should remain working the pumps in order to keep the collieries from being flooded, because every one who knows anything about collieries knows that that is absolutely necessary, and when he adds : " There is no doubt that the safety men got very frightened, and there is no doubt that the safety men would not have continued to work without

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police protection; indeed, as a matter of fact, they did abstain from work—perhaps that is the right way to put it—for a period of four or five days. Their places were endeavoured to be filled by some marine stokers, but those marine stokers proved inefficient and ultimately the safety men were induced to come back" by, I may add, the police dispositions, which had by that time been made and were thenceforth continued.

In view of that statement by Bailhache J., it is interesting to inquire what was the precise ground on which the learned judge nevertheless decided that the appellants must pay for the protection afforded by these dispositions. The answer is not in doubt. It was because he accepted Colonel Smith's evidence that he would have given adequate protection in another and a different form, that is to say, by his mobile column, and the learned judge proceeds: "While not desiring for a moment to suggest that it was not the bounden duty of the County Council to protect this colliery and not for one moment suggesting that the performing of a legal duty will support a promise to pay, I have come to the conclusion that when a colliery company or an individual requisitions police protection of a special character for a particular purpose he must pay for it, and he must pay for it whether he makes a contract to pay or whether he does not—a promise to pay would be implied under these circumstances."

Now, my Lords, Colonel Smith was undoubtedly convinced of the efficiency of his own scheme, and if the whole of his evidence with reference to it is borne in mind his opinion that the mobile force method would have given ample protection may, open to criticism as it is, be accepted, as the learned judge accepted it. But an examination of Colonel Smith's evidence shows what I think the learned judge did not perhaps fully appreciate, that that opinion was held by him, so to say, in vacuo. So far as the safety men were concerned his view was never more than this, that, if they had been as wise as he, they would have recognized that his mobile column was as complete a protection for them as the actual presence of the police at the collieries. Colonel Smith, however,

nowhere suggests that the safety men did so believe or that they could timeously have been induced so to believe. In truth, in propounding and adhering to his scheme, the attitude of these men towards it so graphically described by Mr. James, was discounted by him if indeed it was not entirely ignored. The superintendent, convinced of the sufficiency of his proposals in the abstract, never seems to have even asked himself the question whether any scheme was in the circumstances of any value at all if it was not, by reassuring the safety men and bringing them back to the pumps, effective to protect the collieries from the only danger which threatened them.

While, therefore, Colonel Smith's opinion may so far be accepted, I nevertheless conclude, on what I consider to be the uncontradicted evidence in the case, that that scheme, however technically adequate, was lacking in the one thing needful to make it of any practical utility. It has, in my judgment, been shown that in the then emergency it was no alternative to the garrison scheme which was adopted with complete success. It is also to my mind shown that there was no other scheme either suggested or offered which would have had the same result. The liability of the appellants to bear the expense of the protection they were in fact afforded must, I think, be determined on that footing.

Now, my Lords, with reference to the garrisons actually set apart for the duty of protection, it is to be observed that the number of men employed was fixed by Colonel Smith himself and that the number was altered from time to time at his direction. The men remained throughout under his control. They had their part in the measures from time to time taken by him to maintain order. They made the situation, as Colonel Smith admitted, very much stronger for him. In a word, they were and remained integral units of the divisional police as truly as any other constables under Colonel Smith's command. Nor did the setting apart of the men for that garrison duty in any way interfere with the discharge by the county police force of its other duties. There is no evidence that it involved the authorities in any expense which the county would not otherwise have had to bear,

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and it is admitted that the police protection was required at the appellants' collieries in some shape or form.

Now, I am not myself disposed to underrate the responsibilities of the police in an emergency like that with which your Lordships are here concerned. Their absolute duty to afford protection to life and property was only, I think, limited by the extent of their available resources and by the urgency of competing claims upon their services. The protection in this case supplied was not made difficult of provision by any such considerations. It was adequate, but not extravagant. It was not improper, because otherwise it would not, I assume, have been rendered even in expectation of reward.

In these circumstances, accepting as I do the learned judge's view of the law, I am myself unable to see how any payment for this police service can legally be demanded. The request by the appellants to Colonel Smith to place these garrisons at their collieries is, I think, shown to have been no more than a request to him as representing the County Council to perform its legal duty in the only way in which that duty could properly be discharged, and such a request cannot support a promise to pay for what the Council were in the circumstances bound, as I think, to provide without payment.

Accordingly, my Lords, I arrive at the conclusion which has also been reached by the noble and learned Lord who has just spoken, and I reach it by reference to the facts of this case as I see them, so that the important questions so powerfully discussed by Atkin L.J. do not here, from my point of view, arise for decision.

I think it right to say, however, that in agreement with, I believe, all your Lordships, I find myself unable to subscribe to the extreme position that arrangements under which on the requisition of individuals police constables are assigned in consideration of payment to perform duties in the nature of maintaining order or preventing crime are necessarily either illegal or made without consideration. The legislative recognition of the existence of some such arrangements to

which reference has already been made was, I think, too emphatic to be ignored, and it would be highly inconvenient if it were now to be declared that a promise to pay for such services can never have any binding force.

But the discussion in this case has, I think, shown that the exaction of payment for police services is only legitimate in exceptional circumstances, and it is, in my judgment, unfortunate that it has apparently come to be regarded as a normal incident more particularly in cases where the police are actually billeted in private premises. It is true that while the duty of the police to afford protection is undoubted, the nature of the protection to be supplied must primarily be left to them to determine. If, however, such protection can only or best be afforded by placing constables on garrison duty in private premises, payment cannot, as I think, properly be exacted merely because the protection takes that form as seems at one time to have been assumed on both sides in the present case.

On the other hand, such protection ought not to be provided even for payment if its provision unduly interferes with the discharge by the police of their duties to others. These considerations appear to lead inevitably to the conclusion that unless demands of payment for police services are jealously safeguarded the power to make them may readily become oppressive to the individual and injurious to the general interest.

Where payment is required for protection in the nature of a luxury rather than a reasonable necessity, and where that protection is provided by the employment of the margin of reserve strength of the force not at the time otherwise more urgently employed, then, I suppose, every one would agree with Bankes L.J. that a demand and promise of payment are advantageous to all concerned.

Where, further, an extra force being again available, protection beyond what the police deem necessary is on requisition supplied, then a demand for payment of a sum not greater in amount than the expense of the excess protection —which amount may properly be agreed beforehand—might

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well be justified. But when payment is demanded irrespective of the necessity for protection and merely because protection is afforded in a particular way and in response to an individual requisition, and most especially when the payment represents the total cost to the police authorities of the entire protection supplied, then the whole aspect of the arrangement is altered. In many cases it would become, as Sir John Simon put it, a mere sale of the police discretion, and such arrangements, if they came to be regarded as always permissible, would be, I cannot doubt, vicious in tendency. The possibility of making them would place the authorities in a position in which their interest would frequently conflict with their duty, tending to relegate to a secondary place their primary responsibility to provide adequate gratuitous protection to persons and property within their area, and calculated, on the one hand, to lead to the withdrawal or refusal of proper protection from or to an individual unable to pay for it and, on the other, to a too ready compliance with the requisition of an individual ready and willing to defray the total cost of the protection he receives, in relief it may be of the rates, but in prejudice more than possibly of the general interest.

My Lords, this case will, I cannot doubt, be of great public advantage if it attracts the attention of those concerned to a practice so far unregulated, but which, if not carefully circumscribed, is readily open to unwitting abuse probably in most instances, but only the more elusive on that account.

I am for allowing this appeal for the reasons I have given.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 19, 1924.

Solicitors for the appellants: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

Solicitors for the respondents: *John T. Lewis & Woods, for Andrew & Thompson, Swansea.*

[HOUSE OF LORDS.]

GATESHEAD UNION ASSESSMENT COMMITTEE . . . . . } APPELLANTS ;

AND

OWNERS OF REDHEUGH COLLIERY, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)*
1924
Dec. 17.

Rates—Poor Rate—Appeal to Quarter Sessions—Objection to Valuation List—Notice of Objection to Assessment Committee—Sufficiency—Gross and rateable Values—Statutable Deductions—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *s.* 18—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

A notice of objection given under s. 1 of the Union Assessment Committee Act, 1864, after a valuation list has been approved by the assessment committee should be in writing and should specify the grounds of objection required by s. 18 of the Union Assessment Committee Act, 1862, in the case of a notice of objection given before the approval of the list. But the objector need not inform the committee of the reasons upon which he bases his objection or of the arguments by which he proposes to support it. An objector who appeals to quarter sessions should not be held closely to the points taken orally before the committee.

In 1921 a colliery company was rated to the poor rate upon the basis of the valuation list then in force in the parish, the gross estimated rental being put therein at 2205*l.* and the rateable value at 2152*l.* The company gave to the assessment committee notice of objection to the valuation of the colliery, under s. 1 of the Union Assessment Committee Act, 1864, on the ground that it was unfair, incorrect, or excessive and illegal, but no reference was made therein to the gross estimated rental. At the hearing before the committee the objectors contended that the rateable value was excessive on commercial grounds only, and the committee, after refusing an application for a further hearing, upheld the assessment. On appeal to quarter sessions the objectors raised, in addition to the point argued before the committee, the further point that the rateable value was excessive on the ground of the insufficiency of the statutable deductions from the gross estimated rental. Quarter sessions found that the rateable value was correct in fact, but held that they were bound by *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* [1915] 1 K. B. 763 to accept the second contention of the objectors, and, accordingly, they reduced the rateable value to 1*l.* :—

Held : (1.) that the notice of objection was sufficient; (2.) that the objectors were entitled to raise the question of the sufficiency of the deductions on the appeal to quarter sessions ; (3.) (by Viscount Cave L.C.,

* *Present :* VISCOUNT CAVE L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD CARSON, and LORD BLANESBURGH.

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Lord Shaw of Dunfermline, and Lord Blanesburgh; Viscount Finlay and Lord Carson dissenting) that it was open to quarter sessions to affirm the rateable value as shown in the valuation list.

Horton & Son v. *Walsall Assessment Committee* [1898] 2 Q. B. 237 and *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* [1915] 1 K. B. 763 considered.

Decision of the Court of Appeal [1924] 1 K. B. 369 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Divisional Court on a special case stated by the Durham Quarter Sessions on an appeal against a poor rate.

The case is set out in the report before the Court of Appeal, and the facts are fully stated in the opinion of the Lord Chancellor.

The Divisional Court (Lord Hewart C.J. and Avory J.; Greer J. dissenting) gave judgment in favour of the appellant committee, but this decision was reversed by the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.).

Nov. 14, 17, 18, 20. *Konstam K.C.* (with him *Mundahl* and *Charlesworth*) for the appellants. The point as to the sufficiency of the deductions made from the gross estimated rental in order to arrive at the rateable value was not taken, either in the notice of objection to the assessment committee or at the hearing before the committee. The respondents (the appellants to quarter sessions) were therefore precluded from raising that point before quarter sessions: see Union Assessment Committee Act, 1864, s. 1; Union Assessment Committee Act, 1862, s. 18. The particular objections raised on appeal to the quarter sessions must have been previously brought before the assessment committee. *Williams* v. *Bedminster Assessment Committee* (2); *Reg.* v. *Bedminster Assessment Committee* (3); *Reg.* v. *London Justices* (4); *Rhondda Valley Breweries Co.* v. *Pontypridd Assessment Committee* (5); see also *Reg.* v. *Wiltshire Justices*. (6) Assuming that this point was open to the respondents, the

(1) [1924] 1 K. B. 369.
(2) (1874) 30 L. T. 710.
(3) (1876) 45 L. J. (M. C.) 117, 121; 1 Q. B. D. 503, 506.
(4) [1897] 1 Q. B. 433.
(5) [1909] 1 K. B. 652, 663.
(6) (1879) 4 Q. B. D. 326.

poor rate must be made on the rateable value, and the Court of quarter sessions have found as a fact that the rateable value was correct. The respondents not having accepted the gross estimated rental shown in the rate as correct, they are not entitled in law to make the statutory deductions from a purely fictitious figure in order to reduce the rateable value, which has been found to be correct, to a nominal amount, and so to produce an absurd and inequitable result. In *Horton & Son* v. *Walsall Assessment Committee* (1) and other cases in which that decision has been followed, the ratepayer had formally accepted the assessment of the gross value, and those cases are distinguishable on that ground. It would appear from *Rex* v. *Recorder of Bristol* (2), in which a ratepayer appealed against an assessment on the ground of the unfairness and incorrectness in the valuation of other property in the district—namely, workhouses—the gross sum assessed to the poor rate in respect of the workhouses being less than the true estimated gross rentals, that the assessment of the gross estimated rental can be raised at the instance of a third party. In the absence of any acceptance of the gross estimated rental by the ratepayer the assessment committee are not bound by the gross estimated rental appearing in the rate book and are not precluded from calling evidence before quarter sessions to show that the gross estimated rental has been fixed too low. *Hendon Paperworks Co.* v. *Sunderland Assessment Committee* (3), so far as it decides the contrary, is erroneous, and should be overruled. *Hudson* v. *Rhodes* (4), which decides that an assessment committee has no power to raise the assessment, is also wrongly decided.

Sir Leslie Scott K.C. and *Mortimer K.C.* (with them *Simey*) for the respondents. As to the notice: Under s. 1 of the Union Assessment Committee Act, 1864, no grounds of objection have to be stated. If the grounds of objection are the same as under s. 18 of the Union Assessment Act, 1862, the only grounds are those mentioned in that section—namely, unfairness or incorrectness in the valuation of any

(1) [1898] 2 Q. B. 237.
(2) [1913] 3 K. B. 104.
(3) [1915] 1 K. B. 763.
(4) [1909] 1 K. B. 85.

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hereditaments included in the valuation list or the omission of any rateable hereditament from such list. The ratepayer is not bound to give the reasons for his grounds of objection. There is no condition precedent to an appeal to quarter sessions in s. 1 of the Act of 1864, except that the ratepayer shall have given to the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just. There is no substance in the point that the gross valuation was not referred to in the respondents' notice; they were not objecting to the gross valuation. The absurdity of the 1*l.* assessment is the fault of the rating authority. The whole of the rating of the country is based on gross estimated rental less deductions. [They referred to 43 Eliz. c. 2, s. 5; Poor Relief Act, 1743, ss. 4, 6; Poor Rate Act, 1801, ss. 1, 4; Parochial Assessments Act, 1836, ss. 1, 2, 6, Schedule; Union Assessment Committee Act, 1862, ss. 2, 14, 15, 18–25, 43, 44, Schedule; Union Assessment Committee Act, 1864, s. 1, proviso; Ryde on Rates, 4th ed., pp. 631–3.] The respondents' notice was a valid compliance with s. 1 of the Act of 1864. Their only grievance was that the valuation was too high; the mode in which it was to be reduced was not a matter as to which there was any obligation on the ratepayer to give notice. It is the custom of the assessment committees to accept an informal notice, and except *Williams* v. *Bedminster Assessment Committee* (1), there is no single case in which the notice has been held to be insufficient: see *Halifax Equitable Benefit Building Society* v. *Bradford Assessment Committee.* (2) Assuming that the notice was bad in itself, but could be made good by oral argument before the committee, then, as the committee refused the respondents' application for a further hearing, they cannot complain that this particular point was not raised. As to the question of substance: The Parochial Assessments Act, 1836, defines "rateable value" and provides that every rate shall include every particular set forth in the form given in the Schedule to the Act, otherwise the rate shall be of no

(1) (1874) 30 L. T. 710. (2) (1922) 20 L. G. R. 533.

force and validity; and the heads of particulars set forth in the form include "gross estimated rental." In 1862 assessment committees were created to supervise the work of the overseers and valuation lists were invented. The list is prepared by the overseers and sent to the committee, who, after hearing objections, approve, with or without alterations, and then send it back to the overseers. After that they are as regards that list functi officio, the list becomes the list in force, and the committee cannot alter it except to give effect to the decision of the Court under s. 1 of the Act of 1864. They have no power to raise the assessment: *Hudson* v. *Rhodes*. (1) The committee have no other jurisdiction than to give or refuse relief to the ratepayer. They can neither raise the gross estimated rental nor treat the rate as though the gross estimated rental had been raised. They cannot defend the rateable value on the footing that the gross estimated rental, which they have no power to alter, is wrong. They are not entitled to correct the gross estimated rental, either actually or notionally. The gross value is the starting point and the deductions are to be made from that: *Horton & Son* v. *Walsall Assessment Committee* (2); *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee* (3); *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (4); *John Fowler & Co. (Leeds)* v. *Hunslet Assessment Committee*. (5)

Konstam K.C. in reply. There is nothing in any of the rating Acts which says that the gross estimated rental must be first arrived at and that then the necessary deductions are to be made. This was a case in which quarter sessions were not bound to make the deductions. It was their business to find out what was the true rateable value. [He referred to *Reg.* v. *Inhabitants of Fordham*. (6)]

The House took time for consideration.

(1) [1909] 1 K. B. 85.
(2) [1898] 2 Q. B. 237.
(3) (1898) 14 Times L. R. 347; 62 J. P. 343; 78 L. T. 388.
(4) [1915] 1 K. B. 763.
(5) [1917] 1 K. B. 720.
(6) (1839) 11 Ad. & E. 73.

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1924. Dec. 17. VISCOUNT CAVE L.C. My Lords, in a poor rate and supplemental poor rate made by the overseers of the parish of Gateshead in the months of April and June, 1921, the respondents as the occupiers of the Redheugh Colliery were rated upon the basis of the valuation list then in force for that parish, in which the gross estimated rental of the colliery was put at 2205*l.* and the net or rateable value at 2152*l.* These figures had been in operation since the month of April, 1915, and had been approved by the appellants, the Gateshead Union Assessment Committee. The respondents on September 29, 1921, gave notice to the assessment committee under s. 1 of the Union Assessment Committee Act, 1864, objecting (in terms to be hereafter mentioned) to the above valuation list, so far as the rateable value was concerned; but the committee sustained the assessment. Thereupon the respondents appealed against the rates to the Durham quarter sessions and raised a number of contentions, of which two only are now material—namely, (1.) that the net rateable value was excessive apart from any consideration of the gross estimated rental as stated in the valuation list; and (2.) that in any case the net rateable value was excessive, because the allowance of the statutable deductions from the gross to the net was insufficient, and that in view of the decisions in *Horton* v. *Walsall Assessment Committee* (1) and in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (2) the amount of the net rateable value could not exceed the amount of the gross estimated rental less the statutable deductions. The appellants (the respondents at quarter sessions) met the first of these contentions by calling evidence to show that the rateable value shown in the rate was in fact correctly estimated according to the definition contained in s. 1 of the Parochial Assessments Act, 1836. With regard to the second point they admitted that the average annual costs of the repair, insurance and maintenance of the colliery were more than sufficient, if deducted from the gross estimated rental of 2205*l.*, to reduce the net rateable value to a nominal figure;

(1) [1898] 2 Q. B. 237. (2) [1915] 1 K. B. 763.

but they contended that, having regard to the course taken by the present respondents before the assessment committee, the latter were not entitled in law to raise this contention. The justices at quarter sessions found as a fact that the rateable value shown in the rate was a proper one; but holding themselves bound by the decision in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1) to accept the second contention above referred to, they allowed the appeal and reduced the rateable value to 1*l.*, subject to a special case.

The questions submitted by the special case for the opinion of the Court (omitting the first, which is not now in controversy) were as follows:—

(2.) Whether the justices were right in holding that the appellants at quarter sessions (the present respondents) were entitled to raise the question of the sufficiency of the deductions made from the gross estimated rental in order to arrive at the rateable value; and

(3.) Whether, if they were right on questions (1.) and (2.), they were right in holding that they were bound by the decision in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1) to reduce the rateable value to 1*l.*

If all the questions were answered in the affirmative, their decision was to stand; if any of the questions was answered in the negative, the rateable value shown in the rate was to be restored and the appeal was to be dismissed with costs. The Court was requested to make such further or other order as it should think fit.

The special case was argued before a Divisional Court of the King's Bench Division, consisting of the Lord Chief Justice and Avory and Greer JJ., and judgment was given in favour of the assessment committee, Greer J. dissenting; but on an appeal (by leave) to the Court of Appeal that Court reversed the decision of the Divisional Court and restored the order of quarter sessions. Hence the present appeal.

Before dealing with the first of the above questions—namely, the question whether the respondents were entitled

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to raise at quarter sessions the question relating to statutable deductions—it is necessary to refer in more detail to the proceedings on the respondents' objection before the assessment committee. The material parts of the notice of objection, which was in a form provided by the committee, were as follows : " We hereby give you notice that we object to the valuation of the rateable hereditaments belonging to [or occupied by] us, situate within the above-named Parish or Township ; and that the ground of our objection is that such valuation is unfair, incorrect, or excessive, and illegal. The particulars of each Assessment against which we intend to appeal are stated in the Schedule below. We will attend and state the grounds of our appeal at the meeting of the Assessment Committee, to be holden at the Poor Law Union Offices, Prince Consort Road, Gateshead, on Tuesday, the day of 19 , at o'clock P.M."

The schedule to the notice included the Redheugh Colliery and referred to the rateable value of 2152*l.*, but did not refer to the gross estimated rental. At the hearing before the assessment committee the respondents were represented by their manager, who supported the objection by arguments based (as counsel for the respondents admitted) on commercial grounds only, such as the output of coal, the costs of getting the coal and the sale prices, and not on any grounds relating to the statutable deductions. After some argument the hearing was adjourned pending correspondence with the respondents and inquiries by the committee's valuer ; and it is stated in the special case that " after several intermediate adjournments, although the appellants requested and were refused a further hearing before the committee, the committee on the 19th April, 1922, informed the appellants that they had decided to sustain the assessment at the sums above stated. No express objection was made to the said list either in the said notice or at the said hearing on the ground that the deductions made from the gross estimated rental in order to arrive at the rateable value of the said colliery were insufficient." The contention of the appellants now under consideration is based upon the fact that no express objection

was made to the valuation list, either in the notice of objection or at the hearing before the committee, on the ground that the deduction of 53*l.* made from the gross estimated rental, in order to arrive at the rateable value of the colliery, was insufficient.

My Lords, so far as this contention is based upon a supposed insufficiency in the notice of objection, I agree with the Court of Appeal in holding that it fails. I entirely assent to the view that a notice of objection under s. 1 of the Act of 1864—that is to say, a notice of objection given after a valuation list has been approved by the assessment committee—should comply with the requirements of s. 18 of the Union Assessment Committee Act, 1862, relating to a notice of objection given before the approval of the list, and accordingly that such a notice of objection should be in writing and should specify the grounds of objection. A mere verbal notice or a notice specifying no grounds would give no proper opportunity to the committee of reconsidering the assessment and affording relief to the objector, and it does not appear to me that so futile a formality can have been in the contemplation of the Legislature in passing the Act of 1864. But I think that if the notice specifies as the grounds of objection all or any of the grounds referred to in s. 18 of the Act of 1862, such as unfairness or incorrectness in the valuation of a specified hereditament or the omission of any rateable hereditament from the list, the notice is sufficient, and that it is not necessary that the objector should in his notice inform the committee of the reasons upon which he bases his objection or the arguments by which he proposes to support it. This view is supported by the terms of s. 19 of the same Act, which expressly refers to "unfairness or incorrectness in the valuation of any hereditament of any other person than the person objecting," as a ground of objection to the list. If this is the correct view of the meaning of the section, then the notice given in the present case was sufficient; for one way in which a net valuation may be shown to be incorrect is by showing that the statutable deductions are insufficient, and the objection on the ground of incorrectness therefore

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covers this point. In any case I do not see how the appellants, who themselves provided the form of notice which was used by the respondents, can be heard to say that it was inadequate.

Upon the second branch of the contention under review—namely, that at the hearing of the objection before the assessment committee no point was made as to the insufficiency of the deductions from the gross value—I have felt some doubt. It may be that an objector is under no legal obligation to appear before the committee or to enforce his objection by argument. But if he elects to appear before the committee, it appears to me that he may so conduct his case as to limit his claim for relief to certain specified points, and that if he does so he cannot be said to have "failed to obtain relief" upon other and quite separate points, so as to entitle him to raise those other points on appeal; and this observation applies with additional force when (as in this case) the objector has notified his intention "to attend and state the grounds of his appeal." But in the present case I am not satisfied that the respondents did so limit their objections. It is true that (as the special case states) no express objection was made at the hearing on the ground that the statutable deductions were insufficient. But the hearing was adjourned for the purpose of correspondence and discussion with the committee's valuer, and a request was then made for a further hearing before the committee; and although this request (which by consent has been produced to your Lordships) made no mention of statutable deductions, it is possible that if a further hearing had been granted the question of deductions would have been raised. Accordingly, although I cannot help feeling that the silence of the objectors on the question of deductions may have misled the committee, I agree with the Court of Appeal in holding that the action of the committee in first adjourning the hearing and then refusing a further hearing prevents them from raising this point. I will add that in my opinion it is undesirable that a ratepayer who after an objection under s. 1 of the Act of 1864 appeals to quarter sessions should be held closely to the points taken orally before the assessment committee.

The proceedings on an objection are and were (I think) intended to be informal and inexpensive; and if objectors were confined at quarter sessions to the precise points taken before the committee, it might be necessary for them in future to obtain legal aid and for the committee to take accurate notes of the proceedings. Upon the whole, therefore, I am of opinion that this argument also fails.

I proceed then to consider the third question reserved by quarter sessions for the opinion of the Court—namely, whether quarter sessions were right in holding that they were bound by the decision in the *Hendon Paper Works* case (1) to reduce the rateable value to 1*l*. Strictly speaking, the reference in this question should have been, not to the *Hendon Paper Works* case (1), but to the case of *Horton* v. *Walsall Assessment Committee* (2), which in the *Hendon* case (1) was approved by the Court of Appeal, but was held on the facts of the latter case not to be applicable. In the *Walsall* case (2) the appellant (the ratepayer) accepted as correct the gross estimated rental shown in the valuation list, and claimed to have the rateable value ascertained by deducting from that rental the average expenses of repairs, etc., the amount of which was not in dispute; and it was held that he was entitled so to claim, and that it was not open to the respondents to call evidence to show that the gross rental fixed by the valuation list was too low. A similar conclusion was reached in *Brown* v. *Rotherham Assessment Committee* (3), and in the recent case of *John Fowler & Co.* v. *Hunslet Assessment Committee* (4), where the appeal was from special sessions. My Lords, I do not question the correctness of these decisions. But in all the cases cited other than the *Hendon* case (1) (to which I will refer later) the appellants came to quarter sessions admitting the gross valuation and claiming only to have proper deductions made from it according to the statute in order to ascertain the rateable value; and I greatly doubt whether those decisions apply to the present case, which is of a wholly different character. In the present case the appellants to

(1) [1915] 1 K. B. 763.
(2) [1898] 2 Q. B. 237.
(3) (1900) 64 J. P. 580.
(4) [1917] 1 K. B. 720.

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quarter sessions, by their notice of appeal, questioned both the gross and the rateable values fixed by the valuation list; and when the appeal came on for hearing they still declined to accept the gross estimated rental as correct, and (as the case stated shows) adduced evidence to show that upon the facts, and apart from any question of statutable deductions, the net rateable value shown in the rate was excessive. They were, therefore, inviting quarter sessions to investigate the merits of the case, and after such an investigation, which necessarily involved a consideration of both the gross and the rateable values, to determine the value upon which the rate should be levied; and it was on this invitation that the justices entered upon the inquiry which resulted in their finding that the rateable value of 2152*l.* shown in the rate was a proper one. In considering this question the justices must obviously have had in mind the fact, which was then common ground, that the statutable deductions alone exceeded the estimated gross rental of 2205*l.*; and they must, therefore, have been satisfied before they arrived at their conclusion as to the rateable value, that the real gross rental was not less than the sum of these two figures, or 4357*l.* In these circumstances the contention of the respondents amounts to this, that the justices, who at the instance of the respondents had investigated the gross and rateable values of the colliery and had found as a fact that the true gross value was not less than 4357*l.* and the true rateable value not less than 2152*l.*, were bound by law to throw their conclusions on one side and on the basis of an estimated rental which they knew to be grossly and palpably wrong, to fix the rateable value at 1*l.* Such a result was described by Avory J. as "ridiculous and absurd" and by the Lord Chief Justice as "grotesque"; and Scrutton L.J., while feeling himself compelled by the decisions to accept the conclusion, referred to it in terms hardly more complimentary. "It is very unsatisfactory," he said, "to have to come to a conclusion which you are quite sure is wrong, and it seems tolerably certain in this case probably the gross value is wrong; probably the valuation of 1*l.* is wrong; and yet the machinery

of the statutes and the decided cases compel one to come to the conclusion which one thinks is a wrong conclusion." My Lords, I think it must be admitted that a conclusion which can be described by learned judges in such terms calls for the careful and unfettered consideration of this House; and it appears to me that if the law really compelled your Lordships to subscribe to the same conclusion the law would deserve the worst that has been said of it by its detractors. In my opinion your Lordships are not subject to any such compulsion, and effect can in this case be given to the requirements of justice without infringing upon settled law. Whether the justices could have raised the gross value need not now be considered; for they did not purport to raise it. But, however that may be, I am satisfied that, having regard to the course which the proceedings had taken, it was open to them to affirm the rateable value as shown in the valuation list, leaving it to the overseers in some future list to bring the gross valuation (which outside the metropolis is of little practical importance) into harmony with the ascertained facts.

I desire to add a few observations upon the decision in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1), which appears to me not to conflict with but rather to support the conclusion at which I have arrived. In that case the Court of Appeal did indeed approve the decision in the *Walsall* case (2) to which I have already referred; but, it being alleged that the gross valuation as fixed in the valuation list in the case under consideration was not a real valuation ascertained in accordance with the statute, but was a conventional and fictitious figure inserted by arrangement between the parties, the Court declined to apply the principle of the *Walsall* case and sent the case back to the Recorder for the facts to be ascertained. In the course of his judgment Buckley L.J. pointed out that if the facts alleged were proved the ratepayer would be seeking to rely upon a fictitious figure as being a real sum and from that fictitious figure to make the real statutory deductions, and so would be leading the assessment committee into a trap. It appears to me that

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these observations apply to the present case. Although in this case there is no agreement showing the gross estimated rental to be fictitious, there is a decision of the justices at quarter sessions showing it to be wholly incorrect and illusory; and to permit the ratepayers to rely upon that illusory figure as being a real figure and to set off against it the real statutable deductions in order to reduce the rateable value to nothing would be unjust to the assessment committee and to the general body of ratepayers whom they represent.

For these reasons I am of opinion that the third question reserved by quarter sessions for the opinion of the Court should be answered in the negative, and accordingly that this appeal should be allowed, and that the order of the Court of Appeal should be set aside and the order of the Divisional Court restored with costs here and below.

My noble and learned friend, Lord Blanesburgh, desires me to say that he concurs in this opinion.

VISCOUNT FINLAY. My Lords, this is an appeal from a judgment of the Court of Appeal reversing the judgment of the King's Bench Division upon a special case stated by the Durham Quarter Sessions on an appeal against poor rates.

The question is as to the rateable value of the Redheugh Colliery. In the valuation list in force when the rate, as well as the supplemental rate to which also the appeal relates, was made, the company were rated at the sum of 2205*l.* as the gross estimated rental and 2152*l.* as the rateable or net annual value of the colliery. Widely different views have been taken as to the rateable value. The assessment committee upon the company's notice of objection sustained the assessment at 2205*l.* gross and 2152*l.* rateable. The quarter sessions on appeal against the rates reduced the rateable value from 2152*l.* to 1*l.*, subject to the case stated on which this appeal is brought. In the King's Bench Division it was held, reversing the quarter sessions, that the rateable value should stand as in the assessment list at 2152*l.*; this result was arrived at by the majority of the Court (the Lord Chief Justice and Avory J.), while Greer J.

gave a dissenting judgment, saying that the appeal should be dismissed. In the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) it was held that the rateable value should be reduced to 1*l.*, the amount which had been fixed by the quarter sessions.

The points raised by the case are two in number, so far as the present appeal is concerned. They are :—

(*a*) Whether the colliery company were entitled to raise on the appeal to quarter sessions the question of the sufficiency of the deductions from the gross estimated rental, and

(*b*) Whether the quarter sessions were right in holding that they were bound in law by the decision in the *Hendon* case (1) to reduce the rateable value to 1*l.*

The answer on the first of these points depends upon the question whether on the terms of the first section of the Assessment Committee Act, 1864, the notice of objection to the assessment was sufficient to entitle the company to appeal against the rate on the ground of the insufficiency of the deductions. The answer on the latter of these points depends upon the question whether the decision in the *Hendon Paper Works Co.* case (1) was correct.

I take these two points in the order in which I have mentioned them.

1. By s. 1 of the Union Assessment Committee (Amendment) Act, 1864, it is provided that no person may appeal to any sessions against any poor rate made in conformity with the valuation list approved by the assessment committee "unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just."

The notice of objection in the present case is dated September 29, 1921, and addressed to the assessment committee and to the overseers. It gave notice that the colliery company objected to the valuation of the rateable hereditaments belonging to or occupied by them, and that the ground of objection was that such valuation is "unfair, incorrect, or excessive and illegal." It states that the particulars of each

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assessment against which it is intended to appeal are stated in the schedule to the notice, and adds that the grounds of objections will be stated at the meeting of the assessment committee. In the schedule referred to the present rateable value is given as 2152*l.*, while the column headed "Present Gross Estimated Rental in Rate Book" is left in blank.

As stated in the second paragraph of the special case, the objection was heard by the assessment committee on November 1, 1921, and was adjourned. On April 18, 1922, the company sent a written notice to the assessment committee which, though not mentioned in the special case, was put in by consent on the hearing before your Lordships' House; it asked for further investigation and called attention to the diminished number of workmen employed at the colliery and the diminished output, and stated that the company desired to place further information before the assessment committee. There was no further hearing, and on April 19, 1922, the assessment committee informed the company that they had decided to sustain the assessment.

The special case states that no express objection was made to the list on the ground that the deductions from the gross estimated rental were insufficient. But it is clear that the struggle had been on the question whether the rateable value in the list was excessive, and it is obvious that the difference in the list between the gross 2205*l.* and the net 2152*l.* is not enough to represent what the statutable deductions of such a colliery would be.

The company gave, on June 13, 1922, notice of appeal to quarter sessions. The fifth ground of appeal was "that sufficient deductions have not been made from the gross estimated rentals to arrive at the net annual values of the hereditaments." The appeal came on for hearing at the Epiphany quarter sessions on January 5, 1923. The assessment committee objected that the company were not entitled to raise the question of the insufficiency of the deductions, but this was overruled and the appeal was heard, evidence being adduced on behalf of the company to show that the net rateable value shown in the rate was in itself excessive and

that the deductions were insufficient. The quarter sessions acted on the decision in the *Hendon Paper* case (1), and reduced the rateable value to 1*l.*, stating the case which is now on appeal before your Lordships' House.

The first question which has now to be decided is whether the company were entitled, in view of the Assessment Committee Act, 1864, s. 1, to raise the question of sufficiency of deductions.

In my opinion the quarter sessions were right in holding that the company were entitled to raise this question.

It was strenuously contended that they were not so entitled on the ground that it is not mentioned in the notice of objection lodged with the assessment committee on September 29, 1921, and was not put forward in argument before the Committee.

In my opinion this statute has not the effect of assimilating the procedure before the assessment committee to a hearing on appeal. The assessment committee are assumed to have some practical acquaintance with rating matters and the proceedings before them are not so formal as on a hearing in Court. All that the proviso in s. 1 of the Act of 1864 does is to provide that an opportunity shall be given to the assessment committee of setting right anything in the list which gives sufficient ground of complaint before the expense of an appeal against a rate has been incurred. The form of notice issued by the assessment committee itself was adopted by the colliery company. I think the form was right, as notice in general terms of the nature of objection is enough to satisfy the proviso in s. 1 of the Act of 1864. The assessment committee are experts and have expert assistance, and they may be assumed to be capable of appreciating the real point and seeing what ought to be done without a more detailed notice. If there is any obscurity questions can be put to the complainant or his representatives. If it had been intended to impose upon the parties the burden of a preliminary hearing before the assessment committee with all the formalities of legal procedure, this would, I think, have been

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prescribed in clear language. The expense of course would be very considerable, and I cannot believe that by this enactment it was meant to impose such a fresh burden upon the ratepayer and the rating authority as would be involved in the assimilation of the proceedings before the assessment committee at this stage to those on an appeal to quarter sessions. Moreover, if there was any failure to comply with the statute it was due to the assessment committee themselves, who issued a form for use on such occasions, which form was adopted by the colliery company, and it would be unfair that the assessment committee should get the appeal rejected on the ground that the company followed the procedure directed by the assessment committee themselves. In my opinion Greer J. and the Court of Appeal in the present case were right in thinking that the contention of the assessment committee upon this point fails.

The case does not stand as it would have stood if the notice given to the assessment committee had been misleading and framed so as to lead those who read it to suppose that no objection as to the deductions would be made. The notice stated (inter alia) that the present rateable value is excessive, and the insufficiency of the deductions is one way, and a very common way, of proving such an allegation.

2. I pass to the other question—namely, whether the quarter sessions were right in following the *Hendon* case. (1)

It has been said that to follow the *Hendon* case (1) would lead in the present case to an absurd result, as the rateable value must be far in excess of 1*l*. This is not a legal point, and the question here is one of law, which must be answered according to law, whatever the result may be in the particular case. If indeed the result were obviously absurd it would give good ground for thinking that there must be something wrong in the process by which such a result is reached. But as the point has been made it is worth while observing that there is no sufficient ground for saying that the result in the case of this colliery is absurd. If the expense of getting the coal is excessive a colliery may become commercially worthless,

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I do not see what ground there is for saying that the conclusion which the quarter sessions came to on the authority of the *Hendon* case (1) does in fact give absurd results. But the real question is whether the course taken was legally right.

I am not prepared to overrule the decision in the *Hendon* case. (1) That decision was given in the year 1915, it followed a decision given in 1898 in *Horton & Son* v. *Walsall Assessment Committee* (2), and it was itself followed in *Fowler & Co.* v. *Hunslet Assessment Committee* (3) No sufficient reason has been shown for disregarding such a catena of authorities. In my opinion the decision was right. There is no ground for saying that the entries as to gross value can be treated as mere fancy figures, in which case they would be worse than useless; if wrong they should be set right, but only in due course of law.

In my opinion the *Hendon* case (1) was rightly decided and the quarter sessions were bound to follow it.

I therefore think that this appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the provisions of the statutes relevant to the points raised in this appeal have been already cited by your Lordships who have preceded me.

By s. 1 of the Parochial Assessments Act, 1836, a uniform mode of rating for the relief of the poor was established through England and Wales. That rate was to proceed upon an estimate of net annual value. The annual value was to be the rent at which the hereditaments might be expected to let from year to year less (1.) taxation and (2.) maintenance oncost. The latter was expressed as: "the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them" (the hereditaments) "in a state to command such rent."

This net annual value was thus ascertained as resting upon facts actual and estimated by experience, and such ascertainment proceeded upon practical grounds and was

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not complicated by any division of the subject into gross rental and net rental.

This complication arose by the Union Assessment Committee Act of 1862, under which it was provided that the gross estimated rental should be the annual rent, calculated as before, but under deduction of taxation only. With regard to maintenance oncost the section provided that nothing contained therein should repeal the provision of the first section of the 1836 statute defining the net annual value. I note again that that net annual value was not interfered with ; it was to be arrived at on an investigation of the facts together with all the probabilities depending upon experience to which I have referred, but under deduction of taxation and also of maintenance oncost. The amount of the maintenance item is the difference between net annual value, which takes it into account as a deduction, and the gross annual value, which does not.

The first question before the House has reference to whether the ratepayers had or had not a locus standi under s. 1 of the Union Assessment Committee Act of 1864 to appeal to the special or quarter sessions against the poor rate on their hereditaments. This depends upon the language of the proviso of the section, which is that : " No person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtained such relief in the matter as he deems just."

It is admitted that the ratepayers, as appellants to quarter sessions, did give notice of objection to the assessment committee under s. 18 of the 1862 Act. But it is argued that that objection was disconform to the statute, because it failed to specify " the grounds thereof," and accordingly may be treated as invalid in itself or sufficiently invalid to disentitle the objector to the locus standi of an appellant against the poor rate. In my view this argument is unsound. A good indication of what " the grounds thereof " —that is to say, the grounds of an objection before the

assessment committee—mean is to be found in the very next clause of the section, where "the ground" is indicated as unfairness or incorrectness in the valuation or the omission of a hereditament belonging to some one other than the objector himself. These are, in my opinion, the heads of objection clearly indicated as the "grounds" thereof, and the objection made by those appellants undoubtedly fell within these categories—that is to say, the objectors objected that the valuation put upon their property was unfair and incorrect.

I furthermore think that to put upon a ratepayer the duties in his note of objection of entering into the precise particulars or details or the specification of legal grounds by any reference to the relation between gross value and net value would be unreasonable. The practice has been explained and is familiar. Such objections are very numerous. They are dealt with in a practical spirit. In most cases the valuer and the ratepayer or his representative meet together and endeavour to get at an agreed figure or to understand each other as to what is the real difference to be determined by the committee. That process was begun in the present instance; correspondence and adjournments took place, and "after several intermediate adjournments the appellants requested and were refused a further hearing."

I do not found any part of my opinion upon that; for my view is that the colliery company were de facto objectors upon grounds mentioned in the statute, and that that is enough to satisfy the proviso of s. 1 of the Act of 1864 and to give them a locus standi as appellants to the quarter sessions. The argument on that head fails.

On the merits of the case the present respondents' argue that the appeal made to the quarter sessions was an appeal only against the net rateable value and that it must accordingly fail. It must fail, not because the quarter sessions or indeed either party to the case think that on the facts it should fail, but because the statute of 1862 had introduced a figure of the gross valuation, and that once that figure of gross valuation enters the list, and is not specifically appealed from as such, then the gross valuation

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thereby forms a datum by reference to which the deductions for maintenance oncost being made the net rateable value comes to be stated. It matters not that the result of taking the maintenance oncost and deducting it from the gross valuation would extinguish the net rateable value altogether and would be, as was admitted in argument, quite ridiculous and absurd. The law is, such is the contention, that the obliteration of net rental value must follow, and this company shall pay no rates or be put in the list at a fancy figure of 1*l.*

I point out that neither party to the case conducted the contest before the quarter sessions upon that footing of contesting the probable average annual cost of maintenance, etc. When, however, that cost was practically established, then the point was taken that the amount so reached ought to be deducted from the gross estimated rental so as to reduce the rateable value to nothing.

It is admitted that the result is arithmetically sound if the gross valuation is incapable of adjustment or rectification, and must stand inexorably as the datum line from which the net is to be reached by deduction.

The gross rental was not objected to expressly, nor at the discussion before the quarter sessions was its accuracy admitted. And that tribunal proceeded to investigate the facts, and upon those specifically decided they found that if they were not bound by the decision in the *Hendon Paper Works* case (1), then "the rateable value shown in the said rate was a proper one." Holding as I do that the case of *Hendon* (1) does not rule the present case, this finding in the special case brings the matter to an end. The rateable value has been found in fact to be 2152*l.*, being the sum which the hereditaments would in the opinion of the sessions be let for from year to year after allowance had been made for taxation and also for maintenance oncost. It is that finding, converting that 2152*l.* of actuality into 1*l.* as a consequence of legal decision, that makes the result so discordant with the fact.

I do not enter upon the decisions further than to express

(1) [1915] 1 K. B. 763.

my agreement with the views thereon of my noble and learned friend on the Woolsack. In my opinion these decisions are largely rested either upon the fact, not only that no objection was taken to the gross rateable value, but that, on the contrary, that gross valuation was admitted in the course of the discussion to be correct, or upon the fact that an objection taken to the gross list was in the course of the proceedings expressly withdrawn. But I have to acknowledge that the view taken by authorities, both judicial and administrative, is that a broader question, the question of principle, was there decided—namely, that the gross valuation does rule as a statutory and final datum of reckoning and that facts found as to rateable value must yield to that. If that be so I am of opinion that these cases were wrongly decided. It is the fact that from one cause or another the gross list has obtained the position of a datum from which by way of deduction the net figure is reached.

My Lords, I am clearly of opinion that this result, ridiculous in itself and productive possibly of much hardship to other ratepayers, has been reached on account of too limited a construction being placed upon the concluding portion of s. 1 of the Union Assessment Committee Amendment Act, 1864. The section has provided for an objector with the locus standi having his case heard, and this is done in the following language: "And which objection . . . . the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers who shall thereupon alter their then current rate accordingly."

In my opinion that is as broad as saying that the list is to be brought into correct and proper relation to the facts established as to value. This is not to be done with respect alone to one column in the list, but to all columns in the list—to the list as a whole. The datum is neither one column nor the other, it is reality; and if in the course of the proceedings the reality be proved to be that after deducting taxation and maintenance oncost the rent that would be received

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Lord Shaw of Dunfermline.

from a tenant would be a certain figure, then the function of the quarter sessions is to amend the list—the list as a whole. Granted, as in this case was the fact, that the net rateable value is reached after inquiry upon fact, then the resultant duty is to square the list so as to make it in all its columns accord with the realities of the position. In my opinion an appellant to the quarter sessions has the right to have all consequential things done so as to prevent the proceedings becoming futile. This result is reached by taking the provisions of s. 1 to be what they mean—namely, a provision that the consequences in the adjustment of the entire list must follow, even although the list in the language of the section had been previously approved of; in short, the rectification must be a rectification all round. I am of opinion, as I say, that the section is clear. But were it doubtful then a general rule of construction would come into play. That rule of construction is applicable in the interpretation of all written instruments, including Acts of Parliament. It is that in dubio a construction which results in workability and sense is, upon the whole, to be preferred to one which results in futility and nonsense. I put this down because of the broad admission that unreality and absurdity have in the present case been reached in fact by reason of the stage which had been reached in view of decisions.

I am of opinion, for the reasons given from the Woolsack some of which are also noted above, that the *Hendon* case (1) and those which it followed were, if construed in the broad sense to which I have alluded, erroneously decided; that the list falls to be amended; and that the net value should be taken as found not at the nominal but at the real figure. The consequential amendment upon the gross value should be adjusted accordingly, so as to make the list as such correct.

I agree to the motion proposed from the Woolsack.

LORD CARSON (read by LORD SHAW OF DUNFERMLINE). My Lords, I agree with my noble and learned friend, Lord

(1) [1915] 1 K. B. 763.

Finlay, that this appeal should be dismissed and that the judgment and order made by the Court of Appeal should be affirmed. The right of a subject assessed for poor rate purposes to appeal to a Court of quarter sessions has been recognized in the long series of Acts commencing with the Poor Relief Act of 1601, followed by the Acts of 1743 and 1801, the first and fourth sections of which regulate the appeal to quarter sessions, and which was in force at the date of the passing of the Act of 1864, and is still, as stated by the respondents, in force.

The appeal to quarter sessions, it is to be noted, is the only appeal recognized in any of the Acts which have led up to the existing system of settling the valuation list, a fact which should be borne in mind when we come to construe the Act of 1864, s. 1, upon which so much turns in this case.

Before, however, dealing with that section I think it is necessary to consider, shortly, the schemes laid down under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), for the preparation of the valuation list. The assessment committee is a body appointed by the guardians from among themselves, and when the overseers have transmitted the valuation lists to the committee under s. 18 "any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein" may within the time appointed give notice in writing to the committee and the overseers of his objection "specifying the grounds thereof." Sect. 19 provides for the hearing of such objection, and eventually when the objections have been heard and any alterations found necessary have been made, the assessment committee must finally approve the list, which becomes the basis of the rate to be levied (s. 28), subject to the right of appeal to quarter sessions. In the present case the respondents were assessed in the valuation list at a gross estimated rental of 2205*l.*, and at a rateable value of 2152*l.*, and on September 29, 1921, they gave notice of objection to the valuation of the rateable hereditaments, stating as the grounds of objection that such valuation was

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"unfair, incorrect, or excessive and illegal," and setting out that the particulars of the assessment against which they intended to appeal were the rateable value of 2152*l.* This notice was given under s. 1 of the Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), which makes it a condition precedent to any appeal being heard by quarter sessions that the appellant should "give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided that . . . . no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just."

As I understand it, the first point made in this case is that the notice of objection hereinbefore set out was not a sufficient compliance with s. 1 to enable the respondents to appeal to quarter sessions. It is to be observed that no particular form of notice is required by the section, and further that the form used was supplied by the appellants themselves, and without any intimation upon the face of it that it required any greater particularity. It is also to be noted that, if s. 18 of the Act of 1862 is to afford a guide, it would certainly seem that the general grounds of unfairness or incorrectness were considered sufficient; and, for myself, I cannot come to the conclusion that under the circumstances a notice so drawn is not sufficient to enable the person objecting to appeal to quarter sessions. But it is then said that the respondents did not at the hearing of the objection before the assessment committee rely upon the specific point that the proper deduction had not been made from the gross annual value when fixing the rate. My Lords, I think it is necessary to remember that the proceedings before the assessment committee are of a very informal nature, and in no sense an appeal to a Court. It is merely a proceeding to draw the attention of the committee, who has already settled

the list under the procedure I have already described, to the complaint of excessive rating, and to give an opportunity to have, if possible, the matter arranged by such conferences and methods as may seem applicable. Indeed, the proceedings before the committee in this case as described in the case stated show that there were correspondence and references to valuers, and after an adjournment the matter seems to have been decided without further hearing, and that, although the appellants had asked for a further hearing. That an objector is not bound to give evidence in support of his objection, that no oath can be administered, that there are no rules of evidence, all show that the committee is in no sense a Court, and that the proceeding is an informal one with a view to arresting the attention of the committee to save, if possible, the necessity of an appeal. Indeed, I think the very object of the section would be frustrated if at such a stage a party was obliged to employ legal advisers as to the exact points to be raised from fear he might, through any omission, be deprived of his right of appeal.

Having regard to the views expressed by my noble and learned friend, Lord Shaw, I desire to add that in my opinion as a result of the hearing under s. 1 of the Act of 1864, the committee can only give or refuse relief and has no power to raise the assessment. Lord Alverstone C.J. in *Hudson* v. *Rhodes* (1), says: "It seems to me that their duty" (i.e., the duty of the assessment committee under s. 1) "is confined either to giving the relief sought or refusing it. . . . . They have no jurisdiction under that section to say the applicant's assessment was too low," and Lord Mersey (then Bigham J.) agreed that they had no power to raise the assessment. In my opinion it follows from that decision, with which I am in entire agreement, that the latter part of the section as to amending the current rate has relation only to such relief as they have thought right to grant to the objector.

I am of opinion, therefore, that the appellants were in a position when relief was refused by the assessment committee to serve notice of appeal to the Court of quarter sessions,

(1) [1909] 1 K. B. 85.

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and there is no question that their notice in cl. 5 definitely stated that sufficient deductions had not been made from the gross estimated rentals. It was admitted that the allowance of statutable deductions from the gross estimated rental was not sufficient, but apparently the contention was raised at quarter sessions, as it was here, by the appellants, that if the proper deductions were made from the gross estimated value and the rateable value was thereby reduced, it was open to the Court of quarter sessions to amend the gross estimated value so as to bring it in conformity with the rateable value as amended after the proper deductions had been made.

My Lords, I cannot find any warrant whatever in the statutory scheme under which the rateable value is fixed for any such contention. Under s. 1 of the Act of 1836 (6 & 7 Will. 4, c. 96), the estimate of the estimated gross rental is the basis of the net rateable value, and I am bound to say that I was somewhat startled when I was told by the counsel representing the appellants that the estimated gross rental had no relation to the facts and might for all purposes have been omitted. My Lords, this is no novel statement of the law. It is the law as laid down not merely in the *Hendon* case (1), referred to in the special case, but in others, and as my noble and learned friend states his view that the *Hendon* case was wrongly decided, I think it right to examine the authorities, as I feel unable to agree with the conclusions of the noble Lord. In *Horton's* case (2), decided some twenty-six years ago, it was proposed to increase the gross estimated value because, as in the present case, it was found that the deductions were admittedly too low. Wills J. (with whom Kennedy J. agreed), after stating that the whole apparatus for rating and for appeal in respect thereof was statutory, said that there is "no machinery by which the correct figure for the estimated gross value can be increased after the rate is once made up," and he added, "whatever the quarter sessions may do, they must see that the proper deductions are made, and bring the net rateable value into harmonious

(1) [1915] 1 K. B. 763. (2) [1898] 2 Q. B. 237, 243.

relation with the initial figure." That case was approved in the Court of Appeal in *Hendon's* case (1), when the question was also one of insufficient reduction. Phillimore L.J. said (2): "I think that when an assessment committee have told a ratepayer that the gross estimated rental of his hereditament is a particular figure, the ratepayer is entitled to hold them to that, and to have the statutory deductions made from that figure, and that the assessment committee are not entitled on such an appeal as this" (to quarter sessions), "either to correct the gross estimated rental in fact or to correct it notionally," and Pickford L.J. affirmed *Horton* (3), stating that he did so, though it may produce incorrect results.

In *Fowler's* case (4) Lord Reading C.J. and Ridley and Lush JJ., approved of *Horton's* case (3) and *Hendon's* case. (1)

My Lords, I find myself in entire agreement with the law as laid down in these cases, and I must therefore answer the question submitted by the Court of quarter sessions (No. 3) that they were bound by the decision in the *Hendon* case. (1) I should not have gone at such length into the law affecting rating were it not that from the arguments adduced before me there seemed to be some idea that there was no necessity to follow strictly the statutory provision to which I have already referred. Any such idea is, of course, erroneous, and the ratepayer, whatever the criticism may be upon the result produced, is entitled to insist that the settlement of the valuation list should be carried out strictly in accordance with the law.

In my opinion this appeal should be dismissed with costs, and the judgment and order of the Court of Appeal should stand.

Order of the Court of Appeal reversed, except in so far as regards the answer therein made to the first and second questions submitted in the special case, and third question answered in the negative; and order of the King's

(1) [1915] 1 K. B. 763.
(2) [1915] 1 K. B. 771.
(3) [1898] 2 Q. B. 237.
(4) [1917] 1 K. B. 720.

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Bench Division restored. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 17, 1924.

Solicitors for the appellants: *Maples, Teesdale & Co., for Lambert & Lambert, Gateshead.*

Solicitors for the respondents: *Crossman, Block, Matthews & Crossman, for Murray & Richmond, Newcastle-on-Tyne.*

[PRIVY COUNCIL.]

J. C.* 1924 Dec. 5.

MUNICIPAL COUNCIL OF SYDNEY . APPELLANTS;

AND

CAMPBELL AND OTHERS . . . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Compulsory Purchase—Municipal Corporation—Power to acquire Land—Furtherance of ulterior Object—Sydney Corporation Amendment Act (No. 39 of 1905), s. 16.

The appellants had statutory power to acquire compulsorily land required for the purpose of making or extending streets, also land required for "carrying out improvements in or remodelling any portion of the city." In connection with the extension of a street, they resolved to acquire the respondents' land for the latter purpose. They had previously been restrained from acquiring the land for the extension, on the ground that it was not really required for that purpose, but that its purchase was desired because of its probable increase in value. No plan for improving or remodelling the area was considered or proposed, and evidence as to proceedings in the Council showed that the appellants were endeavouring to give a new form to the transaction previously

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* *Present:* VISCOUNT CAVE, LORD BLANESBURGH, MR. JUSTICE DUFF, and SIR ADRIAN KNOX.

decided upon, rather than considering whether the respondents' land was required for improving or remodelling:—

Held, that the evidence sustained the lower Court's conclusion of fact that the appellants were exercising their powers for a purpose differing from those specified by the statute, and that they had rightly been restrained from acquiring the respondents' land.

Judgment of the Supreme Court affirmed.

CONSOLIDATED APPEAL (No. 51 of 1924) from two decrees of the Supreme Court of New South Wales in its equitable jurisdiction (December 20, 1923).

The question in the appeal was whether the appellants had rightly been restrained from compulsorily acquiring the respondents' land in the City of Sydney under its statutory powers contained in the Sydney Corporation Amendment Act (No. 39 of 1905), as amended by Acts No. 16 of 1906, No. 8 of 1912, and No. 60 of 1916.

The material facts appear from the judgment of the Judicial Committee.

The trial judge (Street C.J.E.) granted an injunction restraining the appellants from resuming or attempting to resume the respondents' land.

The learned judge found that the primary object of the appellants in the acquisition in question was to take at once as much land as they could in the neighbourhood of the new thoroughfare before it increased in value, and to let it on building leases at some uncertain date in the future, but that subject to that everything was to be a matter for subsequent consideration and determination. He held that the appellants had no power to take land without one or other of the definite purposes limited in the said Acts.

The judgment is reported at 24 S. R. (N. S. W.) 179.

1924. July 31; Aug. 1, 4. *Sir John Simon K.C.* and *Hon. Geoffrey Lawrence* for the appellants. Having regard to ss. 16 and 22 of the Sydney Corporation Amendment Act, 1905, as amended, the appellants had power to take the lands in question. If the Council were acting bona fide they could take lands required for remodelling, although no scheme had been approved. The power to resell given by the Act shows

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that recoupment was contemplated. [Reference was made to *Marquess of Clanricarde* v. *Congested Districts Board* (1); *Kore* v. *Bombay Municipal Council* (2); *Calcutta Improvement Trustees* v. *Ghosh* (3); *Galloway* v. *London Corporation* (4); *Donaldson* v. *South Shields Corporation* (5); *Lynch* v. *Commissioners of Sewers* (6); *Gard* v. *Commissioners of Sewers*. (7)]

Sir Douglas Hogg K.C. and *O'Hagan* for the respondents. No part of the land in question was required for any purpose for which the appellants had power to take it. The Council did not act bona fide. Having resolved originally to take the land for an unauthorized purpose, they subsequently persevered in their intention merely under colour of requiring the land for remodelling. Although the fact that no scheme for remodelling was approved is not fatal to the appellants, its absence indicates that the land was not really required for that purpose. [Reference was made to *Lynch* v. *Commissioners of Sewers* (8) and *Westminster Corporation* v. *L. and N.W. Rly.* (9)]

Sir John Simon K.C. replied.

Dec. 5. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. By s. 16 of the Sydney Corporation Amendment Act, 1905, the Municipal Council of Sydney is empowered from time to time, with the approval of the Governor, to purchase or "resume" any land required for "carrying out improvements in or remodelling any portion of the city." By s. 17 the Council is authorized to use the city funds for the purpose of obtaining plans, estimates and reports as to the cost or desirability of purchasing or "resuming" lands; and by s. 18 it is provided that, with the approval of the Governor, the Council may cause a notice of the "resumption" of any land to be published in the Government Gazette and in each of the daily papers: and that a plan showing the separate parcels may be deposited at

(1) (1914) 79 J. P. 481.
(2) (1923) L. R. 51 I. A. 14.
(3) (1919) L. R. 47 I. A. 45.
(4) (1866) L. R. 1 H. L. 34.
(5) (1899) 79 L. T. 685.
(6) (1886) 32 Ch. D. 72.
(7) (1885) 28 Ch. D. 486.
(8) 32 Ch. D. 72, 87, 90.
(9) [1905] A. C. 426, 430.

the Town Hall, Sydney, and at the Department of Lands, Sydney, for public inspection: and that, on the publication of the notice and description, the land to which it relates is to become vested in the Council in fee simple, while the owner acquires a title to be compensated in the manner provided by the statute. By s. 3 of an amending Act of 1906, the Council is authorized to purchase or "resume" any lands required for the opening of new public ways or for widening, enlarging or extending any public ways in the city, as well as any lands of which those required for such purposes are a part.

On March 12, 1923, the Lord Mayor prepared a minute relating to the subject of the extension of Martin Place, an important thoroughfare in the centre of Sydney, and in this minute he recommended the extension of Martin Place to Macquarie Street, and the resumption of a considerable area, which embraced property belonging to the respondents. The proposals of the Lord Mayor's minute were adopted by a resolution of the Council on June 28, and the resumption provided for by the resolution was approved by the Governor in Council.

On the application of the respondents, injunctions were granted by the Chief Judge in Equity, restraining the Council from proceeding under this resolution; and subsequently the Lord Mayor presented another minute, and on November 29 another resolution was passed by the Council, authorizing the resumption of the identical area affected by the former resolution. Again proceedings were taken before the Chief Judge in Equity, who granted injunctions restraining the Council from proceeding under the second resolution; and at the hearing of the actions these injunctions were made permanent. Admittedly, the Council had authority (under s. 3 of the amending Act of 1906) to "resume" lands for the purpose of extending Martin Place. It is also undisputed that the lands of the respondents which the Council proposes to take are not within the limits of any area wnich could be required for that purpose. The right to resume them is based upon the assertion that they are "required"

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for the purpose of remodelling and improving the city within the sense of s. 16 of the Sydney Corporation Amendment Act.

The learned Chief Judge in Equity held that in point of fact these lands were not really "required" for any such purpose, but that, as in the case of the other parts of the area affected which were not necessary for the extension of the street, the resumption proceedings were taken with the object of enabling the Council to get the benefit of any increment in the value of them arising from the extension, and thus, in some degree at all events, recouping the municipality the cost of it; and that, since the resumption of lands for such a purpose alone was indisputably not within the ambit of the authority committed to the Council, the resolutions of June and November were both invalid.

In the first minute presented to the Council by the Lord Mayor (in June), the proposed resumption was treated as a resumption undertaken for and in relation to the extension of Martin Place; and the consequential advantages accruing from the possession of the residual lands, which were supposed to recommend the Lord Mayor's proposals, were the financial advantages alone, arising in the manner just suggested. It is quite true that in the minute of the Governor in Council approving the resolution the proposal approved is described as "a proposal . . . . for the improvement and remodelling of the area in the vicinity," as well as for the extension of Martin Place. But these words, it is shown by the evidence, were inserted at the suggestion of the solicitor for the municipality after the resolution had been passed.

The area described in the resolution of November is the identical area affected by the previous resolution; and, indeed, the proposal to which the resolution professes to give effect is identical in all respects with the previous proposal except for the pronouncement by the Lord Mayor and the declaration in the resolution that the land is required not only for the extension of Martin Place, but for improving and remodelling the area in the vicinity.

No plan for improvement or remodelling was at any time

decided upon ; and, indeed, no such plan was ever considered by or proposed to the Council.

Their Lordships think it not reasonably disputable that at the time of the passing of the resolution in June, the Council conceived it to be within its powers to resume lands not needed for the extension itself, but solely for the purpose of appropriating the betterments arising from the extension ; and that, as Street C.J.E. found, the Council had not at that time applied itself to the consideration of any other object in connection with the resumption of the residual lands. It is not at all inconsistent with this that individual members of the Council may have been actuated by some more or less definite expectation that the lands so " resumed " would be dealt with not by resale to purchasers, but by leasing them, and that one advantage, arising from that mode of dealing with them, would lie in the fact that the Council would thereby retain control over the use to which the resumed lands might be put.

The legal principles governing the execution of such powers as that conferred by s. 16, in so far as presently relevant, are not at all in controversy. A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. As Lord Loreburn said, in *Marquess of Clanricarde* v. *Congested Districts Board* (1) : " Whether it does so or not is a question of fact." Where the proceedings of the Council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object.

Their Lordships think that the conclusion of the learned Chief Judge in Equity upon this question of fact is fully sustained by the evidence. As already mentioned, it is admitted that no plan of improvement or remodelling was at any time before the Council ; and their Lordships think there is great force in the argument that the course of the oral

(1) 79 J. P. 481.

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discussion, as disclosed in the shorthand note produced, shows, when the events leading up to the second minute of the Lord Mayor are considered, that in November the Council was applying itself to the purpose of giving a new form to a transaction already decided upon, rather than to the consideration and determination of the question whether the lands to be taken were required for the purpose of remodelling or improvement. Their Lordships think the learned Chief Judge was right in his conclusion, that upon this question there was no real decision or determination by the Council.

Their Lordships accordingly will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondents: *Donald McMillan & Mott.*

[PRIVY COUNCIL.]

J. C.* 1924 Dec. 22.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK . . . . . } APPELLANTS;

AND

ONTARIO METAL PRODUCTS COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Insurance (Life)—Representation—Test of Materiality—Ontario Insurance Act (R. S. Ont., c. 183), s. 156.

When statements made by an insured person upon his application for a policy of life insurance are not made the basis of the contract but are to be treated merely as representations, an inaccurate statement is material so as to vitiate the policy if the matters concealed or misrepresented, had they been truly disclosed, would have influenced a reasonable insurer to decline the risk, or to have stipulated for a higher premium; it is not sufficient that they would merely have caused delay in issuing the policy while further inquiries were being made.

Judgment of the Supreme Court affirmed.

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* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD SALVESEN.

APPEAL (No. 21 of 1924) by special leave from a judgment of the Supreme Court of Canada (December 4, 1923) reversing a judgment of the Supreme Court of Ontario, Appellate Division, and restoring the judgment in favour of the plaintiffs (respondents) at the trial before Magee J.

The action giving rise to the appeal was to recover under a policy of insurance upon the life of a resident at Toronto, Ontario, issued by the appellant company.

The material facts appear from the judgment of the Judicial Committee.

1924. Nov. 11, 13. *Clauson K.C.* and *Arnoldi K.C.* for the appellants.

Stuart Bevan K.C., *Lionel Davis* and *Hon. Geoffrey Lawrence* for the respondents.

[Reference was made to *Smith* v. *Chadwick* (1); *Joel* v. *Law Union and Crown Insurance Co.* (2); *William Pickersgill & Sons* v. *London and Provincial, etc., Insurance Co.* (3); *Associated Oil Carriers* v. *Union Insurance Society of Canton* (4); *Selick* v. *New York Life Insurance Co.* (5); and Marine Insurance Act, 1906, s. 20, sub-s. 2.]

Dec. 11. The judgment of their Lordships was delivered by

LORD SALVESEN. This is an appeal from a judgment of the Supreme Court of Canada reversing a judgment of the Appellate Division of the Supreme Court of Ontario and restoring the judgment of the trial judge. There has been a great diversity of judicial opinion in the Courts below and for this reason, apart from the general importance of some of the points raised in argument and on which the decision of the case, at least, partly depends, it is necessary to deal in some detail with the facts out of which the controversy arises.

The suit was one at the instance of a policy-holder for payment of the sum of $50,000 insured on the life of a Mr. Schuch, a resident in Toronto. The policy is dated

(1) (1884) 9 App. Cas. 187.
(2) [1908] 2 K. B. 431.
(3) [1912] 3 K. B. 614.
(4) [1917] 2 K. B. 184, 191.
(5) (1920) 48 Ont. L. R. 416.

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December 13, 1918, and Mr. Schuch died of cancer on April 3, 1920. The liability of the appellants is disputed on the ground that the policy had no effect as a valid contract owing to misrepresentation or concealment on the part of the assured in the answers which he gave to certain questions in the application form, a copy of which was indorsed on the policy. The questions and answers founded on are 17 to 20 of the application, but their Lordships think that the answers to questions 19 and 20 add really nothing to the information elicited by Nos. 17 and 18, and that these only need be considered. As they appear in the original application, they are as follows :—

17. What illnesses, diseases, injuries or surgical operations have you had since childhood ?

Name of Disease, etc.	Number of attacks.	Date of each.	Duration.	Severity.	Results.	Date of Complete recovery.
Smallpox	one	42 years ago	un	known	un	known
Trivial ailments since childhood : Typhoid ? doubtful diagnosis ..	one	10 years ago	2 wks.	very slight	complete in 2	recovery weeks.

18. State every physician or practitioner who has prescribed for or treated you or whom you have consulted in the past five years.

Name of Physician or Practitioner.	Address.	When Consulted.	Nature of plaint.	Give full Details above under Q. 17.
None	—	—		

The questions themselves are printed. The answers were written by Dr. McCullough, the doctor who examined

Mr. Schuch in the interest of the appellants. The information on which the answers proceed and which they, no doubt, correctly summarize, was obtained from the assured. When the application form was completed it was read over to the assured and signed by him.

The facts as ascertained by the evidence are briefly as follows: During the five years preceding the date of the policy, Mr. Schuch had been in constant attendance at his office and was never for a single day laid aside from work. The company of which he was managing director was occupied largely in the manufacture of munitions from September, 1915, and for some considerable period thereafter. In consequence they were exceptionally busy and additional work was thrown on Mr. Schuch. He took his work very seriously, and was absent from home on week days very often from early morning until midnight. In January, 1915, his wife was suffering from bronchitis and was attended by Dr. George Fierheller on several occasions. When she had recovered Dr. Fierheller prescribed for her a tonic, the ingredients of which were arsenic, strychnine and iron. This prescription is known as Zambelletti's, and is commonly used as a pick-me-up for persons who are run down. In Mrs. Schuch's case, Dr. Fierheller advised that it should be administered hypodermically. Her husband was himself somewhat pale and run down at the time and the doctor also prescribed for him similar hypodermic injections. It is not clear whether this treatment was suggested by the doctor to Mr. Schuch, or was suggested by Mr. Schuch to the doctor. In either case the doctor no doubt applied his mind to the question how far it was suitable for use by him. The same tonic is more often taken internally, but Mr. Schuch informed Dr. Fierheller that medicine upset his digestion. Accordingly, during the months of March, April and May, Mr. Schuch received hypodermic injections every three days, these injections being generally made in the doctor's office, at which Schuch called for the purpose. In 1916 similar injections were given during part of five months, and again in August, September and October, 1917. The occasion of recommencing

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these injections in each of the years 1916 and 1917 was a 'phone message from Mr. Schuch that he would like the treatment to be resumed and calling at the doctor's office for the purpose of having the injections made. There were no injections for a period of about fourteen months before the policy was issued.

Dr. Fierheller never made any physical examination of Mr. Schuch. He considered that he was simply in the somewhat bloodless condition that very many people get into who have to do their work indoors and do not have adequate open-air exercise. He was never ill in bed during the whole period, and Dr. Fierheller deposed that there was never any occasion for him to make a careful examination. The only advice he tendered was that Mr. Schuch was working too hard and taking his business too seriously.

Dr. McCullough, who was employed by the appellants to make the usual medical examination, and appeared to have conducted it with much care and completeness, observed at the time that Mr. Schuch was a tall, slim, sallow-complexioned man, but did not attach importance to this. He found no trace of disease and certified him in his report to be an erect, healthy man. The cancer of which he died in 1920 was a supervening disease, which was not present when the policy was taken out.

These being the facts, the respondents contend that there was no inaccuracy in the answers which Mr. Schuch gave to questions 17 and 18. Question 17 relates to "illnesses, diseases, injuries or surgical operations," and it was said that the run-down condition into which he had got through overwork or lack of exercise, and for which he received the hypodermic injections, did not fall under any of these heads. There is great force in this view, which has the support of a majority of the judges of the Supreme Court. A man who is able to attend his office every day, and all day, and to do exacting work in a competent way, cannot be described as suffering from illness, even if he is pale and feels overtired at times. Still less can a hypodermic injection be described, as the appellants at one time argued, as a surgical operation.

Their Lordships are, therefore, in agreement with the judges of the Supreme Court who hold that, in answering this question as he did, and omitting any reference to the condition for which he received the injections except as far as it may be covered by "trivial ailments," Mr. Schuch was not guilty of any inaccuracy.

There is more difficulty as to the answer to question 18. The respondents contended that this question must be read with question 17, and construed as limited to the illnesses, diseases, etc., there referred to. It is, however, not expressly so limited, and their Lordships see good reasons why it must be deemed to have a wider application. Just because a man may truthfully represent that he has had no illness, disease, etc., it may be important to have the means of testing his answer by referring to medical gentlemen who have been consulted or have prescribed for him. There is no reason to doubt Mr. Schuch's good faith in giving the answer he did. The suggestion that he should insure his life came from an agent of the Insurance Company, and it is reasonably certain that Mr. Schuch regarded himself as a perfectly healthy man and might well consider the run-down condition for which he had been treated by hypodermic injections as a trivial ailment. Their Lordships are, notwithstanding, of opinion that this answer to question 18 was, in fact, inaccurate, and that it was his duty to have disclosed Dr. Fierheller's name as a physician who had prescribed for or treated him within the five years preceding the date of the policy.

This finding would have been conclusive against the respondents had the policy been in the same form as that which was considered in the recent case of *Dawsons, Ld.* v. *Bonnin* (1), decided in the House of Lords. There the fact that an inaccurate answer was given to a question in the application form, although in itself of no materiality, was held to invalidate the policy of insurance, because the accuracy of the assured's answers was made a basic condition of the contract. In other words, the assured warranted the truth of the representations he made.

(1) [1922] 2 A. C. 413.

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It is not so in the policy now under consideration. It contains a clause in the following terms: "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is indorsed on or attached to this policy when issued." This clause was inserted with a view to complying with s. 156, sub-s. 5, of the Ontario Insurance Act (R. S. Ont., 1914, c. 183). But the full effect of the Act, which governs all policies made in Ontario, can only be appreciated by a careful study of its terms. By sub-s. 3 it is provided: "The proposals or application of the assured shall not as against him be deemed a part of or considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract." Again by sub-s. 4 it is (inter alia) provided "No contract shall be avoided by reason of the inaccuracy of any such statement (i.e., in an application for a policy) unless it is material to the contract," and finally sub-s. 6 provides: "The question of materiality in any contract of insurance shall be a question of fact for the jury or for the Court if there is no jury." These provisions, read together, may be taken to lay down in unmistakable language (1.) that no policy shall be avoided by reason merely of any misrepresentation or inaccuracy in a statement made by the insured in the application form, whatever the terms of the policy might otherwise import, and (2.) that any misrepresentation which may avoid the contract must be misrepresentation of a fact and must be material to the contract.

The main difference of judicial opinion centres round the question what is the test of materiality? Mignault J. thought that the test is not what the insurers would have done but for the misrepresentation or concealment, but "what any reasonable man would have considered material to tell them when the questions were put to the insured." Their

Lordships are unable to assent to this definition. It is the insurers who propound the questions stated in the application form, and the materiality or otherwise of a misrepresentation or concealment must be considered in relation to their acceptance of the risk. On the other hand, it was argued that the test of materiality is to be determined by reference to the questions; that the Insurance Company had by putting the question shown that it was important for them to know whether the proposer had been in the hands of a medical man within five years of his application, and, if so, to have had the opportunity of interviewing such medical man before accepting the risk. The question was therefore, they contended, a material one, and the failure to answer it truthfully avoids the contract. Now if this were the true test to be applied there would be no appreciable difference between a policy of insurance subject to s. 156 of the Ontario Insurance Act, and one in the form hitherto usual in the United Kingdom. All of the questions may be presumed to be of importance to the insurer who causes them to be put, and any inaccuracy, however unimportant in the answers, would, in this view, avoid the policy. Suppose, for example, that the insured had consulted a doctor for a headache or a cold on a single occasion and had concealed or forgotten the fact, could such a concealment be regarded as material to the contract? Faced with a difficulty of this kind, the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the Court, and suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a

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fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

Applying this test, the evidence which has impressed their Lordships most is that of Dr. McCullough—a witness adduced by the appellants and who, as their medical examiner in Toronto, was the person by whom they would naturally be guided in accepting or declining the risk. Now Dr. McCullough states that if Dr. Fierheller's name had been mentioned, he would have noted it in the answer to question 18, but he also emphatically states that if he had known at the time all that Dr. Fierheller deposed to in evidence, he would still have sent up the case with a recommendation for acceptance. In other words, having, as the result of his own examination, passed Mr. Schuch as a healthy man, his opinion would not have been altered by his prior medical history as now ascertained in great detail. Dealing with the evidence as a whole the learned trial judge came to the conclusion that "if the facts as stated in the evidence of Dr. Fierheller with relation to the condition of Schuch and his treatment had been known to the defendant company, it was not at all probable that they would have refused the premium and the issue of the policy, nor do I think they would even have required the examination which the officials now think they would have required." In this finding their Lordships substantially concur, although they would have expressed the finding somewhat differently and would have preferred to say that had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium. Their Lordships, therefore, concur in the conclusion of the trial judge that the non-disclosure or misstatement was not material to the contract and therefore, under the law of Ontario, is not a ground for avoiding it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

One minor matter requires to be dealt with. The appellants on January 29, 1924, obtained an order, granting them

leave to appeal against the judgment of the Supreme Court of Canada, on a petition at their instance for special leave to appeal to His Majesty in Council. Subsequently the respondents lodged a petition to rescind the order granting special leave to appeal on the ground that the appellants' petition contained substantial misstatements and inaccuracies. Counsel for the respondents was heard on this petition at the same time as on the merits of the appeal, but as their Lordships thought that the great diversity of judicial opinion in the Courts below and the importance of the questions raised constituted sufficient ground for granting leave to appeal, the special allegations were not gone into. Now that their Lordships have heard the whole case, they are in a position to judge of the validity of the charges made and have come to the conclusion that some, at least, of the alleged misstatements were not justified by the record and ought not to have been made. In these circumstances they will humbly advise His Majesty that the petition to rescind the leave granted should be dismissed, but without costs to either party.

Solicitors for appellants : *Treherne, Higgins & Co.*
Solicitors for respondents : *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1924 Dec. 15.

VICTORIA INSURANCE COMPANY, LIMITED . . . . . } Appellants;

AND

JUNCTION NORTH BROKEN HILL MINE . . . . . } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Workmen's Compensation—Industrial Disease—Insurance (Employers)—Disablement after Period of Indemnity — Workmen's Compensation Act (No. 71 of 1916, N. S. W.), s. 12, sub-s. 1 (a).

The Workmen's Compensation Act, 1916, of New South Wales provides for workmen being compensated by their employers for injuries from accidents in the course of the employment. By s. 12, sub-s. 1, where it is certified under the Act that a workman is disabled or suspended from work owing to a scheduled disease, and that the disease is due to an employment in which he has been during the previous twelve months, compensation is payable as if the disease were an injury by an accident, subject to modifications, including "(*a*) the disablement or suspension shall be treated as the happening of an accident."

The appellants agreed by a policy to indemnify the respondents from liability to pay compensation under the Act between July 1, 1920, and July 1, 1921. Workmen, while employed by the respondents between these dates, contracted a scheduled disease, but were not certified as disabled thereby until after July 1, 1921. The workmen claimed and were paid compensation by the respondents, who sued the appellants to recover the amount under the policy:—

Held, that the effect of s. 12, sub-s. 1 (*a*), of the Act was not to make the date of the disablement the date of the accident, and that the respondents were entitled to recover under the policy.

Keary v. *Russell, Ld.*, 1915 S. C. 672 approved.

Judgment of the Supreme Court affirmed.

Appeal (No. 89 of 1924) from a judgment of the Supreme Court of New South Wales (March 12, 1924) upon a special case stated.

The question raised by the special case and by the appeal was whether the respondent company was entitled to recover from the appellant company under certain policies of insurance

* *Present:* Lord Dunedin, Lord Atkinson, and Lord Wrenbury.

in force from July 1, 1920, to July 1, 1921, the amount of workmen's compensation paid by the respondent company to its workmen in respect of a disablement due to lead poisoning which was contracted during the period of insurance, but did not disable the workmen until after the said period.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court held that the respondent company was entitled to recover.

1924. Nov. 28. *Holman Gregory K.C.* and *Sir Hugh Fraser* for the appellants.

Clauson K.C. and *Hon. Geoffrey Lawrence* for the respondents.

[Reference was made to ss. 5 and 12 of the Workmen's Compensation Act, No. 71 of 1916, as amended by Act No. 45 of 1920, of New South Wales: *London and Lancashire Fire Insurance Co.* v. *Bolands, Ld.* (1); *Keary* v. *Russell, Ld.* (2); *United Collieries* v. *Simpson* (3); and *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (4)]

Dec. 15. The judgment of their Lordships was delivered by

LORD WRENBURY. The appellants are an insurance office, the respondents are employers of labour. They carry on the business of mining for sulphide ore. They effected with the insurance office two policies of insurance in identical terms, the one insuring them in respect of workmen engaged below ground and the other insuring them in respect of workmen engaged above ground against liability for compensation under the Workmen's Compensation Act, 1916, of New South Wales and against damages at common law for personal injury or fatal accident. Each policy was issued in pursuance of a proposal dated July 30, 1920, which was to be the basis of the contract. The proposal contained a request for the issue of a policy indemnifying against legal liability to pay to or in respect of any direct employee (*a*) compensation under the Workmen's Compensation Act, 1916, or (*b*) damages at

(1) [1924] A. C. 836.
(2) 1915 S. C. 672.
(3) [1909] A. C. 383.
(4) (1913) 109 L. T. 418.

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common law for personal injury or fatal accident within a certain pecuniary limit, and it was stipulated that all employees were to be included.

The policy provided that the proposal should be the basis of the contract and witnessed that if between July 1, 1920, and July 1, 1921, the insured should be liable to pay to, or in respect of, any direct employee (1.) compensation under the Workmen's Compensation Act, 1916, or (2.) damages at common law for personal injury or fatal accident, the company would indemnify them against all such sums for which the insured should be so liable. There were conditions appended to the policy, including: "10. The name and earnings of every direct employee shall be entered regularly in a proper wages book so that a record may exist of such employees as are entitled to call upon the insured for compensation."

The certifying surgeon under the Act gave to seven direct employees of the company certificates of disablement by reason of suffering from lead poisoning, naming dates of disablement of various dates after July 1, 1921—namely, dates ranging from July to December, 1921. The workmen had all been employed by the insured within the period from July 1, 1920, to July 1, 1921. It was not disputed that they contracted nystagmus during their employment and within the year covered by the policy. They claimed compensation under the Act. They received payment from the insured. The insured claimed to be indemnified by the appellants. The Supreme Court in New South Wales held that the appellants were liable to indemnify. This is an appeal from that decision.

The appellants rest their case upon s. 12, sub-s. 1, of the Act of 1916, which is in the following words: "(*a*) The disablement or suspension shall be treated as the happening of the accident." The "accident" which gave rise to the liability of the employer must be taken, they contend, to have happened after July 1, 1921, and there is no liability under the policy.

In the case of an accident liability arises only in the

employer who was employer at the date of the accident. It is a condition of liability that the person said to be liable shall have been employer at that date. The accident must arise "in the course of the employment." In the case of an industrial disease, which is introduced into the Act by the words "as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment," there are no words excluding this condition, but on the contrary there are words to enforce it. For if during the twelve months there have been successive employers a later employer may escape liability if he proves that the disease was contracted whilst the workman was in the employment of an earlier employer. The date of contraction of the disease and not the date of its ascertainment or its certification is the date for fixing liability.

In this state of things their Lordships cannot give to s. 12, sub-s. 1 (*a*), the meaning for which the appellants contend. They argue that the words "The disablement or suspension shall be treated as the happening of the accident" mean "the disablement or suspension shall be treated as *the date of the* happening of the accident." That in their Lordships' judgment is not their meaning. They mean only that that which is not an accident shall, for the purposes of the Act, be treated as if it were an accident, and disablement or suspension is to be the event by whose happening the existence of this statutory accident is to be established. The disablement or suspension establishes the happening of the accident, but not the date at which it happened. It fixes the date as from which compensation begins and with reference to which the twelve months mentioned in s. 12 are to be ascertained. The disease which their Lordships have called a statutory accident has peculiar features, which are provided for by the Act. It is an accident to be attributed in point of date so far as liability is concerned to the time at which the disease was contracted, but subject to "modification" as mentioned in s. 12, sub-s. 1 (*a*), that is to say as regards "compensation" (which is the last preceding subject mentioned in that section), the accident is to be taken as having happened when disablement

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or suspension supervened. The workman is entitled to compensation as if the disease were an accident in the course of his employment subject to the modification that so far as compensation is concerned the disablement or suspension is to be treated as the happening of the accident. Sub-cl. (*a*) is a modification of the rights as regards compensation, and has no bearing upon liability.

If this be not the right view of the Act it would result that if the workman were out of employment at the date of disablement or suspension he would be without remedy. Mr. Clauson pointed out as matter of illustration the consequence which would ensue in this case if the appellants' contention were sound. Suppose that the policy had been renewed for a second year, commencing July 1, 1921, the intention of both contracting parties, of course, would have been that the insured should be covered in respect of liability to which he became exposed during the currency of either of the two policies. But upon the appellants' view he would have no claim on the first policy because the disablement was after July 1, 1921, and inasmuch as the workman having left his employment before July 1, 1921, could not be named in the list of employees required by No. 10 of the conditions in the second policy, he would have no claim under that policy either.

The exact point dealt with above was the subject of decision in the Court of Session in Scotland in *Keary* v. *Russell, Ld.* (1) The relevant language of the British Act is the same as that of the New South Wales Act. Their Lordships think that that case was rightly decided.

The appellants also rested some argument upon the words "liable to pay" in the policy. There was, they contend, no liability to pay until after July 1, 1921. This is not the true construction of the Act. The liability to pay arose so soon as the disease was contracted. It arose and remained in the employer earlier in date (if there were one), notwithstanding that before the date of disablement he had ceased to employ. The liability had not matured into a sum due, but that is

(1) 1915 S. C. 672.

another matter. The first payment fell due after July 1, 1921, but the liability to pay that sum attached when the disease was contracted.

Their Lordships are of opinion that this appeal fails and will humbly advise His Majesty that it should be dismissed with costs.

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Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Light & Fulton.*

[PRIVY COUNCIL.]

MARTIN . . . . . APPELLANT;

AND

STOUT . . . . . RESPONDENT.

J. C.* 1924 *Dec.* 8.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

Egypt—Supreme Court—Jurisdiction—Breach of Contract—Locality of Breach—Contract to be performed in Egypt—Repudiation by Cable from England—Ottoman Order in Council, 1910, *art.* 5.

By the Ottoman Order, 1910, the jurisdiction of the Supreme Court thereby established extends, as regards Egypt, to (so far as material): "(i.) British subjects, as herein defined, within the limits of this Order. (ii.) The property and all personal and proprietary rights and liabilities within the said limits of British subjects, whether the said subjects are within the said limits or not." Rules of Court made under the Order contain a provision for substituted service, but none for service out of the jurisdiction.

The appellant, a British subject resident in England, contracted in England to buy from the respondent, who was resident in Egypt, a concession granted by the Egyptian Government in connection with irrigation, and for the employment of the respondent in Egypt. The appellant repudiated the contracts by a cable despatched from England. The respondent issued a writ in the Supreme Court for Egypt claiming damages from the appellant for breach of the contracts, and obtained an order for substituted service in Egypt:—

Held, that the cable repudiating the contracts having been despatched in England, the breach took place there, and that the Supreme Court had no jurisdiction in the case.

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Cherry v. *Thompson* (1872) L. R. 7 Q. B. 573 and *Holland* v. *Bennett* [1902] 1 K. B. 867 approved.

Quaere whether in art. 5 (ii.) of the Order the words "within the said limits" do not mean "resident within the said limits."

Judgment of the Supreme Court reversed.

APPEAL (No. 64 of 1924) from a judgment of the Supreme Court for Egypt (December 28, 1923).

The judgment appealed from dismissed an application by the present appellant to discharge an order for substituted service of a writ issued in the Supreme Court.

The question for decision in the appeal was whether the cause of action in respect of which the writ was issued was within the jurisdiction of the Supreme Court for Egypt as defined by art. 5 of the Ottoman Order in Council, 1910, and whether the order for substituted service was properly made. The above mentioned Order was continued in Egypt by the Egypt Order in Council, 1915.

The facts of the case and the material provisions of the Order of 1910 and of the rules of the Supreme Court, appear from the judgment of the Judicial Committee.

1924. Nov. 21. *Jowitt K.C.* and *S. L. Porter* for the appellant.

Hon. S. O. Henn Collins for the respondent.

Dec. 8. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court for Egypt in its civil jurisdiction (for convenience styled hereafter as "the Consular Court"), dismissing the appellant's application for an order to set aside the writ of summons in the action hereinafter described, and the service of such writ.

This action was instituted in the above-mentioned Court on May 17, 1922, by the respondent to recover from the appellant damages, the amount of which was not stated, for the alleged breach by the appellant of two agreements both dated September 30, 1921, alleged to have been made between the plaintiff and the defendant, the respondent and appellant, respectively, in this appeal. The Consular Court, it is

admitted, has no jurisdiction such as have the English Courts to allow by leave of the Court or a judge the service of a writ of summons or the notice of a writ of summons outside the jurisdiction of such Courts. The writ of summons in this case takes the form it would naturally have taken if both plaintiff and defendant were resident in Egypt, but as the defendant was, in fact, not resident in Egypt but in England on and before May 17, 1922, the date of the issue of the writ, the plaintiff endeavoured to get over this difficulty by applying for, and obtaining from the Consular Court, the following order: "That service of the said writ be effected upon C. H. Perrott, Esq., barrister-at-law, and that such service be good and effective service upon the defendant."

The affidavit upon which this application was founded sets out succinctly the main facts of the respondent's case. It runs as follows: "I, Percy Wyfold Stout, of Maadi, Cairo, make oath and say: 1. I am the plaintiff in the above action. 2. On September 30, 1921, I entered into a contract with the defendant for the sale of a concession dated April 12, 1921, and another dated December 30, 1920, granted to me by the Egyptian Government for the irrigation of certain areas in Upper Egypt and for the financing of the said concessions. I refer to the said agreement for the precise terms thereof. 3. On the same date, September 30, 1921, I entered into an agreement with said defendant whereby I entered the employ of the defendant in and about the said matters for a period of two years at a salary of 3000*l.* a year, to which contract I refer for the precise terms thereof. 4. The first quarter's salary of 750*l.* was paid me by the said Martin, but the payment due March 31 last has not been made, and the defendant has refused to make such payment. 5. By a letter dated November 2, 1921, Mr. Perrott, barrister-at-law, sent me draft statutes of a proposed company to be formed in Egypt. 6. After a short stay in Egypt the defendant left for London on April 28, 1922, and has since then instructed his London solicitors to inform me that he repudiated the said two agreements. I am advised and verily believe that the defendant has committed breaches of both the above mentioned

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agreements for which I am entitled to damages. 7. I am informed by the said C. H. Perrott and verily believe that he is the legal adviser in Egypt to the defendant, and I verily believe that a writ served upon Mr. C. H. Perrott will be brought by him to the knowledge of the defendant."

The appellant procured a notice dated May 30, 1922, to be served by his solicitor, Mr. Russell, of an application to be made to the Supreme Court for Egypt, exercising its civil jurisdiction at Cairo, to have the writ of summons in the respondent, Stout's, action, and the service thereof set aside. This motion did not come before the Court until December 28, 1923, when it was dismissed with costs. By an order of the Court dated March 1, 1924, leave was given to the present appellant, Martin, to appeal against this last-mentioned order to His Majesty the King in Council.

The questions for decision on this appeal are whether the causes of action in respect of which the writ of summons was issued are within the jurisdiction of the Supreme Court of Egypt as defined by art. 5 of the Ottoman Order, 1910, and, if so, whether this writ of summons could be legally served by substituted service upon a defendant actually residing and at the time being out of the jurisdiction of the Court.

The communication from the appellant's solicitor referred to in the sixth paragraph of his affidavit was the following telegram: "During examination to ascertain whether papers handed us by Martin and claimed by your solicitors were private papers or related to concession, we have come to conclusion that (Martin) must not go on with business and have so advised him. We are instructed give you formal notice Martin repudiates any liability under the two contracts dated September 30 last. Demands repayment 16,000*l*. Holds you liable for damages."

There could be no more distinct repudiation of those two contracts of September 30, no more clear and emphatic expression of an intention on Mr. Martin's part no longer to be bound by them (which latter is apparently the test according to English law: see Lord Collins in *General*

Billposting Co. v. *Atkinson* (1)), than those contained in this telegram. On the other hand, in no way could this repudiation by Mr. Martin be more unequivocably accepted by Mr. Stout, and by him acted upon, than by instituting within forty-eight hours of the telegram reaching him an action claiming to recover damages for breaches of those very contracts so repudiated.

It is well to bear in mind, having regard to the ingenious argument addressed to the Board by Mr. Henn Collins on behalf of the respondent, that the relief prayed for by Mr. Stout in his writ was not a decree for specific performance of the contracts or either of them, nor yet the recovery of an ascertained and measured debt of any kind due to him by Martin, but the recovery of damages for breaches of the contracts, and that alone.

It is provided by art. 90 of the Ottoman Order, 1910, subject to its provisions, the civil jurisdiction of every Court acting under the Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, the English law for the time being in force. It is essential, therefore, to consider what effect upon contracts such as those of September 30, and the rights and liabilities of the parties thereto, would such a repudiation as that contained in this telegram, accepted and acted upon as the respondent Stout has accepted and acted upon. The repudiation would have to be according to the principles of the English law.

In the *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) Lord Blackburn, in homely but very effective language, laid down the law touching the breach of contracts to be performed at a future time by the repudiation of them by some of the parties to them before that time arrived. He said: "I myself have no doubt that *Withers* v. *Reynolds* (3) correctly lays down the law to this extent that where there is a contract to be performed in future and one of the parties has said to the other in effect: 'If you go on and perform your side of the contract I will not perform mine.' In *Withers* v.

(1) [1909] A. C. 118, 122. (2) (1884) 9 App. Cas. 434, 442.
(3) (1831) 2 B. & Ad. 882.

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Reynolds (1) it was: 'You may bring your straw but I will not pay you up on delivery as under the contract I ought to do. I will keep one bundle of straw in hand so as to have a check on you.' That, in effect, amounts to saying: 'I will not perform the contract.'" In that case the other party may say, "You have given me distinct notice you will not perform the contract. I will not act till you have broken it, but I will treat you as having put an end to the contract and, if necessary, I will sue you for damages; but at all events I will not go on with the contract." That was settled in *Hochster* v. *De la Tour* (2) in the Queen's Bench, and has never been doubted since, because there has been a breach of the contract, although the time indicated in the contract has not arrived.

Many other authorities might be cited in support of this well-established principle of English law, that where a contract is to be performed on a future day or is dependent on a contingency, and one of the parties to the contract repudiates it and shows by word or act that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the arrival of the time fixed for performance, or the happening of the contingency on which the contract is dependent, and is himself absolved from the further performance of his part of the contract. If he elects to do this the contract is completely at an end, and the party in default is not entitled to an opportunity to change his mind. But the repudiation of a contract by one of the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived or the contingency upon which the performance of the contract was dependent has happened.

In *Tredegar Iron and Coal Co.* v. *Hawthorn & Co.* (3) Collins M.R. (as he then was) said that was clear law that repudiation by one party to a contract was a nullity unless it was accepted by the other party to the contract; and

(1) (1831) 2 B. & Ad. 882. (2) (1853) 2 E. & B. 678.
(3) (1902) 18 Times L. R. 716.

Mathew L. J. said that repudiation was of no effect unless it was acted upon by the other party. If acted upon, there was what was called an anticipatory breach of contract, and the damages were to be calculated at the acceptance of the repudiation.

The Ottoman Order in Council, 1910, is the quasi-legislative enactment establishing the Court, the order of which is, in this case, impeached. It defines the jurisdiction of the Court, and prescribes its procedure. By art. 2 the limits of the Order are defined to be the dominions of the Sublime Ottoman Porte, but as respects Egypt, it provides that those limits do not extend to any place south of the twenty-second parallel of North Latitude; and further provides that the expression "Ottoman Dominions" and "Egypt" are, for the purpose of the Order, to be construed accordingly. The portions of Egypt north of this parallel are the limits within which in Egypt the Order applies. A British subject is, by art. 3, defined to include a British protected person, and an Ottoman Tribunal is defined to include Egyptian Tribunals, except where the context otherwise requires. The Court established by the Order is, by art. 8, defined to be His Majesty's Supreme Court for the Sublime Ottoman Porte, is in the Order referred to as the Supreme Court, and is comprised in the term "Court."

Art. 5, upon the construction of which the question for decision mainly turns, enumerates and describes some of the persons and matters to whom and to which the jurisdiction conferred by the Order extends—namely, "(i.) British subjects, as herein defined, within the limits of the Order." That, in their Lordships' view, must mean British subjects in the portion of Egypt north of the twenty-second parallel of North Latitude. "(ii.) The property and all personal or proprietary rights and liabilities within the said limits, of British subjects, whether such subjects are within the said limits or not." The other enumerations are irrelevant to this case.

It is not quite clear whether the words "within the said limits," as applied to British subjects themselves, do not mean British subjects resident within the limits, and not

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merely British subjects temporarily or momentarily stopping or resting within them in transit from some place south of the above-mentioned parallel to some place north of it; for instance, in travelling from Khartum to Port Said or Alexandria. A somewhat similar difficulty presents itself as to the meaning of the words "within the said limits," as applied to all personal rights and liabilities of British subjects who are not within the limits. For instance, if a trader residing in Khartum contracted to deliver goods at Cairo and failed to do so, or published a libel in a Cairo newspaper, would his liability for damages for breach of contract or for libel come within this sub-section, though he may never in his life have been north of the twenty-second parallel? This difficulty of construction would seem to suggest that the liability within the limits to which the sub-section refers means the liability of a person himself resident within the limits.

Art. 129 of the Ottoman Order, 1910, empowers the judge of the Supreme Court to make rules of procedure. The following are among rules so made:—

"116. (4.)—Except as otherwise provided in these rules, and unless the Court thinks it just and expedient otherwise to direct, service shall be personal, that is, the summons shall be delivered to the person to be served himself.

"119. Where it appears to the Court (either after or without an attempt at personal service) that for any reason personal service cannot be conveniently effected, the Court may order that service be effected (*b*) By delivery thereof to some person being an agent of the person to be served or to some other person within the jurisdiction of the Court on its being proved that there is reasonable probability that the document will, through that agent or other person, come to the knowledge of the person to be served; Provided that where the person to be served is not within the limits of the Principal Order, an order under this rule shall not be made by a Provincial Court, except such order as is authorized by paragraph (*b*).

"334. The Rules of the Supreme Court in England do not apply in the Ottoman Dominions, but where the local practice

is in doubt regard may be had in the discretion of the Court to the practice and procedure of the High Court and other Courts in England."

Neither in the Order itself nor in any rule made under it is any provision to be found similar to that contained in Order XI., r. 1, of the Rules of the Supreme Court in England, authorizing a Court or judge to allow a writ of summons to be served out of its jurisdiction. No form is prescribed for such a writ either by the Order or by the rules.

The writ of summons in this case violates the provision of r. 105, in that the amount of the damages claimed is not mentioned, while the affidavit of the respondent Stout, dated May 30, 1922, supporting the application to substitute service, in no way complies with the form which the rules prescribe.

An affidavit sworn by Martin, the appellant, in London, on January 18, 1923, was filed in the Supreme Court and was used in evidence on the application to substitute service of the writ of summons. In it the appellant stated that he is of British nationality, is domiciled in England; that he visited Egypt some time in 1922; never resided there, never had any intention to reside there; that C. H. Perrott, barrister-at-law, had advised him occasionally in connection with the agreements the subject matter of the action, but that he had not been and was not at the time of swearing the affidavit, his agent, and had not any authority to accept service on Mr. Martin's behalf. He further stated that the agreements of September 30 were negotiated between him and Stout, the respondent, in England, and were completed in England, and further that, on May 15, 1922, he instructed his English solicitors, Messrs. Sugden and Hextall, to inform the appellant Stout by telegram that he (Martin) repudiated both these agreements.

The Supreme Court delivered judgment on December 28, 1923, and apparently decided the matter of fact that service of the writ on C. H. Perrott would most probably come to the knowledge of Martin, the appellant. There was evidence undoubtedly before the Court upon which it might reasonably have come to that conclusion. It must therefore be accepted

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in this appeal; but the Court decided the case expressly on the ground that, under art. 5 (ii.) of the Order, there was a personal liability on Martin arising (sic) within the geographical area governed by the Order in Council.

Their Lordships are with all respect entirely unable to concur with the Supreme Court in that conclusion. They think it is in conflict with well-established authority. The distinct repudiation by Martin of his liability under the contract by the telegram of May 15, 1922, handed in at London, was a breach of his contract, involving liability attaching to him. It was, however, a breach conditional on Stout accepting and acting upon the repudiation. He did accept and act upon it in the most emphatic way. In his affidavit to ground the application to substitute service he swore he had been advised and believed that by this telegram Martin had committed breaches of both the agreements, for which breaches he, Stout, was entitled to damages, and he applied for substituted service of the writ, claiming damages for these very breaches.

The following three cases clearly establish that Martin's breaches of his agreements were, according to English law, committed in London, where this repudiating telegram was handed in to the telegraph office, and that any liability on him was, therefore, incurred in England and not in Egypt. In *Cherry* v. *Thompson* (1) the plaintiff and the defendant, both British subjects being in Germany, became engaged to marry. The plaintiff came to England and there received a letter from the lady, written and posted by her in Germany, in which she declined to carry out her engagement. It was held that the breach of the contract to marry occurred in Germany, the receipt of the letter only providing evidence of the breach, and not constituting the breach itself. Blackburn J., in delivering the judgment of the Court, said (2): "In the case of *Frost* v. *Knight* (3) the judgment, delivered in the Court of Exchequer Chamber shows with great force the reasons why the renouncing of the relation of betrothed

(1) L. R. 7 Q. B. 573. (2) L. R. 7 Q. B. 579.
(3) (1872) L. R. 7 Ex. 111.

parties by one party is at the option of the other a breach of the promise to marry, though the time for the performance of the contract has not yet arrived. In this case the receipt of the letter by the plaintiff in England furnished him with evidence that the defendant had in Germany renounced that relation. Had his letter followed him to Ireland he would have received the evidence in Ireland. But the act which he had the option to treat as a breach took place in Germany, and in Germany alone."

In *Holland* v. *Bennett* (1) the plaintiff was employed by the defendant, who was a foreigner resident abroad, as the London correspondent of a newspaper of which the defendant was the proprietor. The defendant, by a letter written and posted abroad, directed to the plaintiff in England, gave the latter notice of dismissal. In an action for wrongful dismissal brought by the plaintiff, leave was given to issue a writ of which notice was to be served upon the defendant out of the jurisdiction. Notice of the writ had been accordingly served upon him abroad. It was held that the alleged breach of contract, having arisen out of the jurisdiction, the case did not fall within Order XI., r. 1, and that the writ and service should consequently be set aside. *Cherry* v. *Thompson* (2) was approved of and followed, and Vaughan Williams L.J., in delivering judgment, said (3): "The effect of the decisions is that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad, and under these circumstances I think that the order was right and the appeal must be dismissed."

The last case that need be referred to is *Mutzenbecher* v. *La Aseguradora Espanola*. (4) In that case the agent-general of the defendant company, a company domiciled at Teneriffe, came to London with full authority to revoke a certain agreement entered into between the company and the plaintiff to employ the latter as their exclusive agent in England and elsewhere for a period of five years. He did revoke this agreement by a notice in writing sent through the London

(1) [1902] 1 K. B. 867.
(2) L. R. 7 Q. B. 573.
(3) [1902] 1 K. B. 867, 869.
(4) [1906] 1 K. B. 254.

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post office to the plaintiff's address. It was held that there was a breach of the plaintiff's contract of service within the jurisdiction, because the contract was revoked by one having full authority in that behalf by a notice sent through the London post. Collins M.R. (as he then was), in giving judgment, said (1): "In my view there can be no doubt that there was a breach of the contract within the jurisdiction because the case is not that of sending a letter from abroad as in *Cherry* v. *Thompson* (2), but of an act done here in sending to the plaintiffs a letter of dismissal. That act was done by the agent-general of the defendants with their authority and on their behalf, and was thus an act done by them within the jurisdiction."

In their Lordships' view no liability arising out of these two contracts of September 30, 1921, or the breach of them, rested on the appellant Martin within the geographical limits mentioned in art. 2 of the Ottoman Order.

They think the judgment appealed from was wrong, and should be reversed, and this appeal be allowed with costs here and below, and the action dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Sugden & Hextall.*
Solicitors for respondent: *Vallance & Vallance.*

(1) [1906] 1 K. B. 259. (2) L. R. 7 Q. B. 573.

[PRIVY COUNCIL.]

BRASSARD (IN PLACE OF LEVESQUE) . APPELLANT; J. C.*
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SMITH AND OTHERS . . . . . RESPONDENTS. Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Succession Duty—Situation of Property—Shares registered and transferable outside Province—"Transmission"—Quebec Succession Duty Act (4 *Geo.* 5, *c.* 9), *arts.* 1375, 1376.

A banking company, the head office of which was at Montreal in the Province of Quebec, had power by statute to maintain in any Province a registry office at which alone shares held by residents in that Province were to be registered and could validly be transferred. A person who was resident and domiciled at Halifax in the Province of Nova Scotia, died there owning shares in the bank, the shares being registered at an office maintained by the company at Halifax under the above statutory power.

Succession duty in respect of the shares was claimed under the Quebec Succession Duty Act (R. S. Queb., 1909, as amended by 4 Geo. 5, c. 9 (Queb.)); by art. 1376 of the Act as amended the duty was imposed upon "property actually situate within the Province . . . . whether the transmission takes place within or without the Province":—

Held, that as the ownership of the shares could be effectively dealt with only in Nova Scotia, they were not property situate in Quebec, and the claim could not be maintained.

The word "transmission" in art. 1376 is used to express the legal result which follows the death, not to express the actual steps necessary to invest the new owner.

Attorney-General v. *Higgins* (1857) 2 H. & N. 339 approved.

Judgment of the Supreme Court affirmed.

APPEAL (No. 105 of 1923), by special leave, from a judgment of the Supreme Court of Canada (June 15, 1923), reversing (so far as is material to this report) a judgment of Court of King's Bench for Quebec (June 28, 1922), which affirmed a judgment of the Superior Court of that Province.

The respondents were the administrators of the estate of one Wiley Smith, who was domiciled and resident at Halifax, in the Province of Nova Scotia, and died there in 1916

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD SALVESEN.

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intestate. The appellant was the collector of succession duty in the Province of Quebec.

The only question in the appeal was whether the respondents were liable to pay succession duty under the Quebec Succession Duty Act (R. S. Queb., 1909, as amended by 4 Geo. 5, Queb., c. 9), in respect of 2076 shares in the Royal Bank of Canada forming part of the estate of the deceased.

The material facts and statutory provisions appear from the judgment of the Judicial Committee.

The Treasurer for the Province of Nova Scotia had recovered judgment in the Supreme Court of Nova Scotia, which judgment had been affirmed by the Supreme Court of Canada (see *Smith* v. *Provincial Treasurer of Nova Scotia* (1)), for succession duty in the Province of Nova Scotia in respect of the shares in question.

In the present case the Supreme Court of Canada (consisting of Davies C.J., and Idington, Duff, Anglin, Brodeur, and Mignault JJ.) held (2) that that Court was bound by its decision above referred to, and accordingly dismissed the claim for Quebec succession duty so far as it related to the bank shares.

1924. Nov. 25. *Geoffrion K.C.* and *Hon. Geoffrey Lawrence*, for the appellant, referred to *Smith* v. *Provincial Treasurer of Nova Scotia* (1); *Attorney-General* v. *Higgins* (3); *Attorney-General* v. *Lord Sudeley* (4); *In re Clarke* (5); *New York Breweries Co.* v. *Attorney-General* (6); *Hughes* v. *Rees* (7); and Dicey on Conflict of Laws, 3rd ed., pp. 342–344.

Wilfrid Greene K.C. and *Hon. Stafford Cripps* for the respondents were not called upon.

Dec. 22. The judgment of their Lordships was delivered by

LORD DUNEDIN. Mr. Wiley Smith died on February 28, 1916, domiciled in Nova Scotia and intestate. The respondents

(1) (1919) 58 Can. S. C. R. 570.
(2) [1923] S. C. R. 578.
(3) 2 H. & N. 339.
(4) [1896] 1 Q. B. 354.
(5) [1904] 1 Ch. 294.
(6) [1899] A. C. 62.
(7) (1884) 5 Ont. R. 654.

are his administrators appointed by the Probate Court of Halifax in Nova Scotia. Part of his property consisted of shares in the Royal Bank of Canada. The appellant, who was the plaintiff in the action, is the collector of succession duties in the Province of Quebec, and he sues the respondents for succession duty in respect of these shares. He bases his claim on arts. 1375 and 1376 of the Revised Statutes of Quebec, 1909, amended by 4 Geo. 5, c. 9.

Art. 1375 imposes a duty upon property and art. 1376 is as follows: "The word 'property' within the meaning of this section includes all property, moveable or immoveable, actually situate within the Province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the Province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicil within or without the Province, or whether the transmission takes place within or without the Province."

As the deceased was not domiciled in Quebec the claim necessarily depends on the plaintiff showing that the deceased's shares were property actually situated within the Province.

The Royal Bank is a corporation incorporated and carrying on business by virtue of the Dominion Bank Act. Its head office is in Montreal, but by s. 43, sub-s. 4, it is provided: "The Bank may open and maintain in any Province in Canada in which it has resident shareholders and in which it has one or more branches or agencies, a share registry office, to be designated by the directors, at which the shares of the shareholders, resident within the Province, shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred."

The Royal Bank did open such an office in Halifax, and the deceased's shares were registered there and the certificate therefor was held by the deceased in Halifax. The respondents, having applied for probate in Nova Scotia, made up title to the shares, but, on the intervention of the present appellant, conveyed a certain number of the shares in trust to meet the present claim. The action as originally

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started demanded also payment in respect of shares in other companies which had their offices and registers in Quebec. As to these companies, the present respondents, not having the advantage of the specialty in connection with the local register in Nova Scotia, could only rely on the argument that shares had no local habitation, that accordingly the doctrine mobilia sequuntur personam must apply, and that the domicil of the deceased being in Nova Scotia the action must fail.

The case came before de Lorimier J. in the Supreme Court of Montreal. He decided that shares could have a local habitation and that that local habitation was the head office of the company. He accordingly decreed in favour of the plaintiff as to both sets of shares. That judgment was appealed to the appeal side of the Court of King's Bench. That Court affirmed the judgment, the judges being unanimous that shares could have a local habitation, which, therefore, concluded the matter in respect of the shares other than those of the Royal Bank, but as to the Royal Bank shares, held by a majority of three to two that the local habitation was in Quebec, the dissentient judges holding that it was in Nova Scotia.

Appeal was taken to the Supreme Court of Canada. In the meantime, while this litigation was going on, another action had been raised by the Nova Scotia tax authorities against the same executors for succession duties on the same shares in the Royal Bank. This action had found its way to the Supreme Court of Canada, which had decided that the Royal Bank shares were liable in Nova Scotia, either as having a local situation in Nova Scotia or as being attached to the domicil of the testator, which was in Nova Scotia. Accordingly, when the appeal in this case came to the Supreme Court they held themselves bound by their former judgment, and allowed the appeal, so far as relating to the Royal Bank shares. Appeal has now been taken to the King in Council.

The judgment, so far as dealing with the shares other than those of the Royal Bank, is acquiesced in, as there is no cross-appeal. In these circumstances their Lordships think it best

to deal exclusively with the question of the local situation of the shares, assuming that shares have a local situation. If they cannot, the appellant cannot succeed, because the deceased was not domiciled in Quebec. Upon the assumption that they can, their Lordships think that the judgment of the Supreme Court was right.

The argument for the appellant was put in two ways. Admitting that, for the purposes of transference, the shares can now only be dealt with in Nova Scotia, they said that there were many things in connection with shares other than transference which could only be done in Quebec, as for instance the declaration of a dividend, the claim put forward in the event of liquidation, the voting at a general meeting, etc. The argument seems to their Lordships clearly double-edged; for if there are, so to speak, so many qualities of a share which are attributable to different places it would seem to follow that there cannot be a proper local habitation for a share at all—an argument which is necessarily excluded from the appellant, because it would be fatal to him in another aspect.

The appellant then argued that the words of s. 4 of the Dominion Bank Act are "at which, and not elsewhere, such shares may be validly transferred," and that the word "transferred" applied to transfer inter vivos and must be distinguished from transmission, which is a proper term for what happens on death. Their Lordships do not think that this distinction can avail.

Sect. 51 deals with transmission by decease: "Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder. . . . . (*c*) if the deceased shareholder died out of His Majesty's dominions, any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any Court or authority having the requisite power in such matters; shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share in pursuance of and

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in conformity to the probate, letters of administration, or other such document as aforesaid."

It is clear from this that "transmission" is used to express the legal result which follows on death, but not to express the actual step which is necessary to invest the new holder. That is done by transfer, and that transfer in such a case is effectuated by a change in the register where the shares are registered, that is in this case in Nova Scotia. Their Lordships consider that the question was really settled by *Attorney-General* v. *Higgins*. (1) Baron Martin in that case says in so many words: "It is clear that the evidence of title to these shares is the register of shareholders and, that being in Scotland, this property is located in Scotland."

It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a subsequent case of *Attorney-General* v. *Lord Sudeley*. (2) In the present case Duff J., dealing no doubt with the "no local situation" argument, said as follows: "And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction.'" This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question.

It may be well to remark that, although in the way the case has developed itself, it has been found unnecessary to decide whether shares can have a local situation, their Lordships must not be considered as throwing any doubt on the soundness of the conclusion to which the Supreme Court has come in that matter.

Their Lordships think it also necessary to add that no

(1) 2 H. & N. 339. (2) [1896] 1 Q. B. 354.

question was argued before them as to whether the legislation, in so far as it sought to place a tax on this particular estate, was ultra vires of the Province. They do not suggest that questions could have been raised such as were raised in the case of *Burland* v. *The King* (1), lately before the Board. They only wish to make it clear that the judgment in this case has no corollary attached to it dealing with such matters.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Burchells.*

[PRIVY COUNCIL.]

BARTLETT AND ANOTHER . . . . . APPELLANTS;

AND

BARTLETT AND OTHERS . . . . . RESPONDENTS.

J. C.* 1924 Dec. 22.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

Egypt—Will—Testamentary Power of Mahomedan—Religious Law—Ottoman Order in Council, 1910, *art.* 90.

By art. 90 of the Ottoman Order in Council, 1910, which was continued in Egypt by the Egypt Order in Council, 1915: "Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English law for the time being in force. Provided that in all matters relating to marriage, inheritance, or other questions involving religious law or custom, the Court shall, in the case of persons belonging to non-Christian communities, recognize and apply the religious law or custom of the person concerned."

A Moslem British subject domiciled in Egypt died in 1918 possessed of property which was all in Egypt. He was survived by his mother, who according to the Moslem law of inheritance was entitled to a

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(1) [1922] 1 A. C. 215.

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one-sixth share of his estate. The deceased executed a will in the English form leaving all his property to his widow and children :—

Held, that having regard to the proviso to art. 90 of the Order of 1910, the testator had no testamentary power over the share of his estate to which his mother was entitled by Moslem law.

Judgment of the Supreme Court reversed.

APPEAL (No. 85 of 1920) from a judgment of the Supreme Court for Egypt (April 4, 1924).

The appeal related to the testamentary power of a Moslem British subject domiciled in Egypt having regard to art. 90 of the Ottoman Order in Council, 1910, and the Moslem law of inheritance.

The facts appear from the judgment of the Judicial Committee.

1924. Dec. 2, 4. *De Gruyther K.C.* and *Hon. S. O. Henn Collins* for the appellants referred to *Bremer* v. *Freeman* (1) ; *Croker* v. *Marquis of Hertford* (2) ; *Abd-ul-Messih* v. *Farra* (3) ; *Casdagli* v. *Casdagli* (4) ; and Dicey's Conflict of Laws, 3rd ed., rr. 184, 194.

Sir W. E. Hume-Williams K.C. and *S. Hyams* for the respondents referred to *In re Johnson.* (5)

Dec. 22. The judgment of their Lordships was delivered by

LORD SUMNER. This is an appeal from a judgment of His Majesty's Supreme Court for Egypt at Cairo, by which it was declared that the will of Mahomed Khalil Bartlett was valid in form and substance ; that only the beneficiaries named in it were entitled to the estate, and that the appellants, defendants below, were not beneficially entitled to any share in the estate.

The testator, a Moslem British subject domiciled in Egypt, died on September 28, 1918, leaving Behana Hanem Bartlett, his mother, him surviving. She died in 1919, leaving two sons, the defendants in this action. Mahomed Khalil Bartlett was a man of considerable property, both movable and

(1) (1857) 10 Moo. P. C. 306.
(2) (1844) 4 Moo. P. C. 339.
(3) (1888) 13 App. Cas. 431.
(4) [1919] A. C. 145.
(5) [1903] 1 Ch. 821.

immovable, principally the latter, and all in Egypt. He made a will in English form, of which he named his brothers, the present appellants, executors, and by it he left all his property to his widow and children. The plaintiffs in the present action are his surviving children. The executors duly proved the will and obtained probate in His Majesty's Provincial Court at Cairo on October 12, 1918. Like the testator, all the parties concerned are Moslems.

The beneficiaries under the will subsequently commenced proceedings in the Mixed Court of Cairo for partition of the estate and, the present appellants having there advanced a claim to share in it personally, an interlocutory judgment was given referring the parties to the Court competent to deal with the estate—that is, the Court from which the present appeal comes—in order that it might decide the rights of the parties.

For this purpose the present respondents brought their action claiming the before-mentioned declarations, which were made in the judgment under appeal, and the present appellants counterclaimed a declaration, that they were each entitled to one-eighteenth part of the estate, which counterclaim the learned judge dismissed. Their ground of claim was that, by the Moslem law of inheritance, the mother of the deceased testator, who survived him, was entitled to a one-sixth share of his estate, and that by Moslem law the right of inheritance is distinct and independent of any right to testamentary disposition. The reply admitted this statement of the Moslem law, nor, apart from the grounds hereinafter discussed, has the defendants' right to succeed to their mother's share in the proportions claimed been contested either here or below.

The defendants maintained and the plaintiffs denied that, by virtue of the proviso to art. 90 of the Ottoman Order in Council, 1910, which was continued in Egypt by the Egypt Order in Council, 1915, the testator could not dispose by his will of the mother's heritable share and that, pro tanto, his will was inoperative.

The article in question is as follows: "PART IV.—CIVIL

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MATTERS. 90. Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being in force. Provided that in all matters relating to marriage, inheritance or other questions involving religious law or custom, the Court shall in the case of persons belonging to non-Christian communities recognize and apply the religious law or custom of the person concerned."

The learned judge of the Supreme Court for Egypt at Cairo expressed the grounds of his decision by referring to a judgment which he had previously pronounced, in a suit brought to obtain a declaration that the will of Behana Hanem Bartlett was void, not being a valid testamentary disposition according to Moslem law. In that case he expressed himself as follows: "The Court, having found that the testatrix was of sufficient mental capacity to make a will, is now called upon to decide the important point of law on the pleadings in this action, which allege that, even if the testatrix was of sound mind and possessed of testamentary capacity, she was bound to make her will in accordance with the Moslem law, she being a Moslem, although a British subject. Plaintiff's counsel bases his argument mainly on the construction of s. 90 of the Order in Council, 1910, which he submits makes it obligatory on every British subject, who is a member of a non-Christian community, to make his will in accordance with his religious law or customs, and that he has absolutely no option of making it in accordance with the law of England. The Court cannot entertain such argument. My opinion is that the section of the Order in Council merely enjoins the Courts of this country to recognize and apply religious law and customs when it is desired by a party having the right to move the Court to that effect, and whose affairs are being subject to judicial investigation, and has no intention of interfering with the right of a British subject to make his or her will in conformity with the privileges given under the Wills Acts and Lord Kingsdown's Act, which seems to me to be so clearly established that any interference with it by an Order in Council would be a repugnancy within

the meaning of the Foreign Jurisdiction Act and quite ultra vires."

In his judgment now under appeal the learned judge further adds: "I am clearly of opinion that the testator, having been a British subject, had every right to make his will in conformity with the provisions of the Wills Act, and no Order in Council can take away such privilege. . . . . This Court is equally certain that art. 77 of the Egyptian Civil Code lays down in the simplest terms the law of real property as it affects strangers, whether as testators or intestates, and no necessity arises in Egypt for applying the law of lex situs as it might be in other countries."

This, then, is the learned judge's ground for his decision, and it is important and far-reaching. He dismissed the contention that the defendants had estopped themselves from raising their claim by becoming and acting as executors of the will, and this contention has not been renewed before their Lordships. Two additional arguments have been advanced. The first, which is only a different way of stating the learned judge's view, is that, as regards Egypt, the lex loci rei sitae and the law of the domicil is for a British subject domiciled in Egypt the law of England in virtue of the provisions of the Egyptian Mixed Civil Code, but that the Moslem law of inheritance forms no part of it. The second is that, upon the true construction of art. 90 of the Ottoman Order in Council, the proviso does not extend to cases where the deceased proprietor has made a will, since the words "and succession" are not added to the word "inheritance," but that it refers only to that part of the law affecting an intestate's property, which is concerned with immovables.

The last contention may be conveniently disposed of first. It cannot be denied of the present action that it deals with "matters relating to inheritance." It is not a suit to propound a will, or to set aside a will, or to construe a will. As the pleadings above cited show, it is a suit in which one party affirms and the other denies a right of inheritance, which is essentially extra-testamentary. Their Lordships see no ground for a technical construction of the word "inheritance," which

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in this case is a general term, nor do they read it as exclusive of all rights that are not strictly rights to realty. Even if it were so, however, the defendants' claim to a share of the deceased's movables would still be within the words "other questions involving religious law or custom," for the Moslem law on this subject is derived from the Koran, the Traditions and the Concordance among the Followers (Ijmâ 'a-ul-Ummat), and the deceased's mother is one of the twelve "sharers" (zav-il-furûz) mentioned by the Prophet.

The learned judge's view is evidently not one which depends merely on the form of the will, or on an obligation to make a will in Moslem form, if at all. It is that a British subject, who would otherwise be bound by Moslem law, can at his option, and to the prejudice of relatives, who have as such a right to inherit from him under the Moslem law, invest himself with a wider disposing power than the Moslem law gives him, by simply making his will under and in conformity with the Wills Act. He holds further that, if the Order in Council purports to require questions relating to inheritance to be decided in such a case according to Moslem law, it is repugnant to English law and is therefore invalid.

The reference made by the learned judge is to s. 12, sub-s.1, of the Foreign Jurisdiction Act, 1890, of which the material words are: "If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country . . . . it shall be read subject to that Act . . . . and shall, to the extent of such repugnancy, but not otherwise, be void."

Their Lordships are unable to adopt the learned judge's view or to hold that the appellants' construction of the Order in Council involves any repugnancy to any Act of Parliament. The enactment in question is the Wills Act, 1837, s. 3, for Lord Kingsdown's Act does not appear to affect the matter. That section provides that: "It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate, which he shall be entitled to either at law or in equity

at the time of his death, and which, if not so devised, bequeathed and disposed of, would devolve upon the heir at law . . . . or upon his executor or administrator."

There is nothing here to enable a person, who, by the law which binds him in his lifetime, holds his property with a strictly limited right of testamentary disposition, to dispense himself from that restriction and to dispose of his property by will without any limit at all, simply by making his will in the form prescribed by the Wills Act, and by purporting to make dispositions in it, contrary to and in excess of those which the law then applicable permits to him. To the extent of one-sixth of the movables, they would not have devolved upon his administrator if there had been no will, and the same proportion of his real property would not have devolved upon his heir at law in the sense in which the Wills Act uses those words.

Such a construction sets aside the English rules, which apply the lex loci rei sitae to dispositions of foreign immovables and the law of the domicil to dispositions of foreign movables, although they are at least as much part of the principles of the English law as are the provisions of the Wills Act. In effect, the provisions of the Egyptian Mixed Civil Code, arts. 77 and 78, show that the lex loci rei sitae and the law of the country of the domicil are, in the case of a British subject domiciled in Egypt, the law, which the Crown has by Orders in Council prescribed for His Majesty's Courts in Egypt, per Lord Finlay L.C. in *Casdagli* v. *Casdagli* (1); *Sasson* v. *Sasson*. (2) Art. 90 of the Ottoman Order in Council lays down that law for present purposes clearly and consistently—namely, the principles of English law, not in omnibus but "as far as circumstances admit," with a further proviso in the nature of an exception similar to the rules, established in British India, that Moslems and Hindus shall enjoy and be bound by the law of their communities in matters such as the present. Their Lordships think that the whole question is really one of the construction of art. 90, and that the proviso to that article, truly construed, preserved the mother's

(1) [1919] A. C. 145, 156. (2) [1924] A. C. 1007.

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right and placed it beyond the reach of the testamentary disposition, which her son purported to make.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, with costs here and below, that the judgment appealed against ought to be set aside, and that in lieu thereof declarations ought to be made as prayed in the counterclaim.

Solicitors for appellants: *Vallance & Vallance.*
Solicitors for respondents: *Gisborne & Co.*

[PRIVY COUNCIL.]

J. C.* 1924 Dec. 22.

LORD'S DAY ALLIANCE OF CANADA . APPELLANTS;

AND

ATTORNEY-GENERAL FOR MANITOBA RESPONDENT.

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Canada (Manitoba)—Provincial legislative Powers—Sunday Excursions—Lord's Day Act (R. S. Can., 1906, c. 153), s. 8—Lord's Day (Amendment) Act (Stat. Man., 1923, c. 25), s. 1—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 27; s. 92, heads 13, 16.

The Lord's Day Act (R. S. Can., 1906, c. 153) made it a punishable offence to run or conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force." An Act passed by the Legislature of Manitoba in 1923 to amend the Lord's Day Act of that Province (R. S. Man., 1913, c. 119), enacted by s. 1 that it should be lawful to run or conduct Sunday excursions to resorts within the Province. Sunday excursions were not unlawful by the laws of England existing in 1870, which were part of the law of Manitoba by 51 Vict. c. 33 (Dom.):—

Held, that the Manitoba statute of 1923 being merely permissive, and not dealing with a matter brought within the criminal law, was competent to the Provincial Legislature under the British North America Act, 1867, s. 92, heads 13, 16; and, that being so, the Act was a

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD CARSON, LORD BLANESBURGH, and MR. JUSTICE DUFF.

provincial Act "now or hereafter in force" within the meaning of the Lord's Day Act of Canada. It was unnecessary to consider whether the Act of 1923 could be justified as Dominion legislation by delegation or reference.

Attorney-General for Ontario v. *Hamilton Street Ry. Co.* [1903] A. C. 524 distinguished.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 52 of 1923) from a judgment of the Court of Appeal of Manitoba (May 23, 1923) upon questions referred to that Court by the Lieutenant-Governor of the Province under R. S. Man., 1913, c. 38.

The questions referred to the Court of Appeal were in substance as to the validity of a statute enacted by the Legislature of Manitoba in 1923 dealing with the subject of the running of Sunday excursions within the Province.

The questions, the answers returned by the Court of Appeal, and the statutory provisions relevant to the case appear from the judgment of the Judicial Committee.

1924. July 14, 15, 16. *Rowell K.C.* and *Bergman K.C.* for the appellants. A Provincial Act is not one "in force" within the meaning of the Lord's Day Act (R. S. Can., 1906, c. 153), s. 8, unless it is an Act intra vires the Provincial Legislature under the British North America Act. Having regard to the decision of the Board in *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1), and to that of the Supreme Court of Canada in *Ouimet* v. *Bazin* (2), the Act of 1923 was ultra vires, as it related to the criminal law, a subject reserved to the Dominion Legislature by s. 91, head 27. Sect. 92, head 16, does not give a Provincial Legislature power to modify the criminal law unless it is Provincial criminal law within that head. Many acts involved in the excursions purported to be allowed would be infractions of 29 Car. 2, c. 7, s. 1, which formed part of the law of Manitoba by 51 Vict. c. 33 (Dom.). *Reg.* v. *Silvester* (3) does not conflict with that view. Further, the railways operating in Manitoba are Dominion railways within s. 92, head 10 (*c*), of the

(1) [1903] A. C. 524. (2) (1906) 46 Can. S. C. R. 502.
(3) (1864) 33 L. J. (M. C.) 79.

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Act of 1867, and thereby outside the sphere of Provincial legislation.

E. L. Newcombe K.C. for the Attorney-General for Canada supported the appellants; he contended that the Dominion Legislature could not confer upon a Provincial Legislature power to legislate upon a matter as to which power is given by the British North America Act to the Dominion; he referred to observations by Lord Watson in the course of *Canadian Pacific Ry. Co.* v. *Notre Dame de Bonsecours* (1) mentioned at p. 7 of Lefroy's Canadian Federal System (1913).

R. W. Craig K.C. and *Hon. Geoffrey Lawrence* for the respondent. The Act of 1923 was intra vires, since it was permissive and not restrictive or criminal, and was within s. 92, heads 13 and 16. The judgments in *Ouimet* v. *Bazin* (2) show that had the Act then under consideration been merely permissive it would have been held to be intra vires. Sunday excursions were not prohibited by the Dominion Lord's Day Act, nor by 29 Car. 2, c. 7; the subject was therefore outside the domain of the criminal law. The Act of 1923 merely declared the common law. Sect. 5 of the Dominion Lord's Day Act was not a delegation of the legislative power, but was legislation by adoption or reference; the provision in the Act of 1923 was in effect Dominion legislation. [On the question of delegation or reference the following cases were cited: *Powell* v. *Apollo Candle Co.* (3); *Valin* v. *Langlois* (4); *In re Gray.* (5)]

Rowell K.C. in reply referred to *R.* v. *Sam Bow* (6) and *In re Jorgensen.* (7)

Dec. 22. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This appeal, relating to the permissibility or otherwise of certain Sunday excursions within the Province of Manitoba, raises important questions as to

(1) [1899] A. C. 367.
(2) (1912) 46 Can. S. C. R. 502.
(3) (1885) 10 App. Cas. 282.
(4) (1879) 5 App. Cas. 115.
(5) (1918) 57 Can. S. C. R. 150.
(6) (1918) 27 Brit. Col. R. 234.
(7) (1923) 2 West. Weekly Reporter, 600.

the legislative powers in relation to such matters possessed by the Parliament of Canada on the one hand and the different Provincial Legislatures on the other. Is it open to a Provincial Legislature to permit such excursions within its own Province? Or, is such a matter, even in this aspect of it, now parcel of the criminal law, so as to be within the legislative competence of the Dominion Parliament alone? These, it will be found, are the broad questions which emerge on this appeal.

They arise upon a statute passed by the Legislature of Manitoba in the session of 1923. The statute is intituled "An Act to amend the Lord's Day Act" of the Province, being c. 119 of the Revised Statutes, 1913, and it provides in s. 1 for the addition to that Act of a clause making it lawful "For any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, notwithstanding anything to the contrary in that or any other Act of the Legislature of Manitoba or in any law in force in the Province over which the Province has legislative authority."

Sect. 2 amends s. 2 of the principal Act by adding these same excursions to the works of necessity and charity which by that section are put outside the prohibition of the statute. The Act was not at once to be operative. It was to be brought into force only on proclamation by the Lieutenant-Governor in Council, and before that step had been taken the following questions were, on April 19, 1923, under the authority conferred by c. 38 of the Revised Statutes of Manitoba, referred by His Honour in Council to the Court of Appeal of the Province for hearing and consideration:—

"1. Is it lawful in Manitoba for any person or corporation on the Lord's Day to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire to summer resorts, beaches or camping grounds within the Province, assuming that 'An Act to amend the Lord's Day Act' enacted at the present session of the

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Manitoba Legislature has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council ?

"2. Are either or both of ss. 1 and 2 of an 'Act to amend the Lord's Day Act' passed at the present session of the Manitoba Legislature valid, assuming that the said Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council ?

"3. Is the 'Lord's Day Act,' being c. 119 of 1913 Revised Statutes of Manitoba, as amended by 'An Act to amend the Lord's Day Act,' passed at the present session of the Manitoba Legislature, within the legislative jurisdiction and powers of the Legislature of Manitoba, assuming that the last-mentioned Act has been duly brought into force on proclamation by the Lieutenant-Governor-in-Council ?

"4. If the answer to question 3 is 'No,' in what particular respect has the Legislature exceeded its powers ?"

It will be observed that each of these questions is concerned with a state of things resulting from the new Act being duly brought into force. The Lieutenant-Governor-in-Council expresses a desire to be informed as to the legality of the excursions to which he refers only on the assumption that that Act has been made operative, and no question as to their legality apart from the Act is propounded. Their Lordships were, however, strongly urged by the appellants to deal with and dispose of the view that such excursions were lawful in Manitoba independently of the Act altogether—a view expressed by some of the learned judges of the Court of Appeal in this case and foreshadowed in an earlier decision of the same Court.

Their Lordships will refrain from taking this course, for one compelling reason, which they name out of several which would justify reserve in this matter.

Statutes empowering the executive Government, whether of the Dominion of Canada or of a Canadian Province, to obtain by direct request from the Court answers to questions both of fact and law, although intra vires of the respective Legislatures, impose a novel duty to be discharged, but not enlarged by the Court : see *Attorney-General for Ontario* v.

Attorney-General for Canada. (1) It is more than ordinarily expedient in the case of such references that a Court should refrain from dealing with questions other than those which on excessive responsibility are in express terms referred to it, and their Lordships will here act upon that view.

On May 23, 1923, the Court of Appeal for Manitoba formally certified its answers to the questions. Its answer to the first was in the affirmative, and to the second question its effective answer was that s. 1 of the Act being valid, s. 2 was inoperative and unnecessary.

Following upon these answers the Act was brought into force by proclamation, and the present appeal from the certificate of the Court of Appeal has been by special leave of that Court presented by the Lord's Day Alliance of Canada, supported by the Attorney-General of the Dominion, who has by leave intervened in the proceedings and been made a respondent to the appeal.

It may be assumed that the Provincial Legislature, in passing the Act of 1923, was purporting to exercise the power which it treated as being reserved to it by s. 8 of the statute of the Dominion—the Lord's Day Act, 1906. That section is as follows: "It shall not be lawful for any person on the Lord's Day, *except as provided by any provincial Act or law now or hereafter in force*, to run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire and having for its principal or only object the carriage on that day of such passengers for amusement or pleasure, and passengers so conveyed shall not be deemed to be travellers within the meaning of this Act."

The real question raised on this appeal may therefore be thus phrased: "Is the Manitoba Act of 1923, now duly proclaimed, 'a Provincial Act hereafter in force' within the meaning of s. 8 of the Lord's Day Act, 1906?" The full significance of these words can perhaps best be appreciated if some consideration be first given to the legislative history in Canada of this question of Sunday observance since the passing of the British North America Act in 1867.

(1) [1912] A. C. 571.

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That history has been somewhat disturbed. For many years after 1867 it was apparently assumed on all hands that the power of legislating with reference to Sunday observance within a Canadian Province was by s. 92 of the Act exclusively committed to the Provincial Legislature as being either a matter (s. 92, head 13) relating to property and civil rights in the Province or as being one (s. 92, head 16) of a merely local or private nature in the Province. It was assumed also that appropriate penalties for the non-observance of Sunday might under s. 92, head 15, be enacted by the Provincial Legislature as a means of enforcing a law of the Province made in relation to a matter coming within a class of subjects enumerated in the section. So widely held was this view that not only was no Dominion statute with reference to this subject ever promulgated, but in most of the Provinces legislation was passed having for its object the compulsory observance of Sunday within the Province or the laying down of rules of conduct to be followed on that day, accompanied by appropriate sanctions for non-observance or breach. The Lord's Day Act, 1902, of Manitoba is one of these Provincial statutes: The Ontario Act of 1897, c. 246, "An Act to Prevent the Profanation of the Lord's Day," is another.

It was not until 1902 that the validity of any of these enactments was called in question. In that year, however, the Court of Appeal of Ontario were asked whether the Ontario statute was valid, and although the enactment was upheld in that Court, on appeal to this Board it was decided by their Lordships that the Act, *treated as a whole*, was beyond the competency of the Ontario Legislature. The ground of the decision was that an infraction of the Act was an offence against the criminal law, and that the criminal law in its widest sense is by s. 91, head 27, of the British North America Act reserved for the exclusive legislative authority of the Parliament of Canada: see *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1) Subsequent decisions in Canada showed that in this respect no valid distinction could be drawn between the Ontario statute and other prohibitory

(1) [1903] A. C. 524.

statutes with reference to Sunday observance passed by other Provincial Legislatures, and accordingly it was deemed necessary by the Parliament of Canada itself to deal by legislation with the subject, and the Dominion Act (R. S.), 1906, c. 153, to which reference has already been made, was the result.

The form of that statute is notable. Some of its prohibitions are general and unqualified, as, for example, shooting on Sunday (s. 10), or sale of foreign newspapers on that day (s. 11). Other prohibitions—those, for instance, contained in ss. 5 and 7 and in s. 8, above set forth—are each qualified by the phrase or its equivalent, " except as provided by any provincial Act or law now or hereafter in force." Lastly, there are a great number of activities, stated by the statute to be included in the general expression, " works of necessity or mercy," but many of which, apart from that statutory inclusion, would not naturally be so described, as to which there is no prohibition at all.

The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet* v. *Bazin* (1), this course was no doubt adopted " to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy."

There is therefore reserved to each Province power in these intermediate cases by (inter alia) " a Provincial Act . . . .

(1) 46 Can. S. C. R. 502, 530.

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hereafter in force" to exempt that Province from the operation of the general prohibition in whole or in part.

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1) decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The border-line between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of

(1) [1903] A. C. 524.

the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on July 15, 1870, from which day the Dominion Parliament, by 51 Vict. c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been " in force " in the Province in the fullest meaning of these words, as found in the Act of 1906. And the section, if then in " force," would have so continued notwithstanding the passing of that Act. It would have been a " Provincial Act . . . . now in force."

As Duff J. says in *Ouimet* v. *Bazin* (1), when speaking of the Lord's Day Act, 1906 : " This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday ; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law

(1) 46 Can. S. C. R. 502, 526.

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within the meaning of the enactments of the 'British North America Act' already referred to." With those observations the Board is in entire agreement.

But his Lordship was there dealing only with Provincial laws in force when the Act of 1906 was passed. The same principle, however, as it seems to the Board, must apply to Provincial statutes subsequently enacted. That the Parliament of Canada so intended is clear from the language it has used, and there seems no valid reason why that intention should not have effect. The Dominion Legislature, of course, may at any moment by prohibiting Sunday excursions under appropriate sanctions bring these within the domain of the criminal law and thereby at once withdraw such activities entirely from the cognizance of the Legislature of any Province. But what the Parliament of Canada may do in this matter it may also forbear to do, and permissive Provincial legislation effective for its purpose, because the Parliament of Canada has not previously intervened at all, can be no less effective after such intervention if by its very terms the previous liberty of the Provinces in this matter remains unaffected. In each case the Provincial Legislature is exercising a power which, in the one case by silence and in the other case in words, the Parliament of Canada has left intact.

In this view of the matter it becomes unnecessary for their Lordships to consider, as some of the learned judges of the Court of Appeal have done, whether such Provincial legislation as that now in question may be justified as being in effect Dominion legislation by delegation or reference. They prefer, without saying more on that matter, to justify it on the grounds they have set forth.

In the result their Lordships agree with the Court of Appeal that the first question of the Lieutenant-Governor-in-Council should be answered in the affirmative.

The learned judges of that Court preface their answer to the second question, already given, by a statement to the effect that, as s. 2 of the Manitoba Lord's Day Act is prohibitive and provides a penalty for every breach, it invades

the field of criminal legislation and is ultra vires under the decision in the *Hamilton Street Ry.* case (1), and they go on to say that adding an exception of something valid from a constitutional standpoint to a section that is ultra vires does not give validity to the section itself. Their Lordships agree with the Court of Appeal in thinking that s. 2 of the Manitoba Lord's Day Act is, under the *Hamilton Street Ry.* case (1), ultra vires the Provincial Legislature, and they do not find it necessary to consider or determine whether the amendment of the section by the Act of 1923 might be severed from and stand independent of that enactment, for in the present case the whole question is academic. Sect. 2 of the statute of 1923 adds nothing effective to s. 1, and need not be regarded. Their Lordships, therefore, are content merely to express their agreement with the actual answer given to that question by the Court of Appeal.

To the third question the answer of the Court of Appeal was as follows: "This Court is unable to distinguish c. 119 of the Revised Statutes of Manitoba, 1913, as it stood before the proposed amendments from the Act pronounced by the Privy Council in *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1), to be ultra vires of the Provincial Legislature. As to the amending Act submitted, this Court has above expressed the opinion that s. 1 thereof is valid and that s. 2 thereof is inoperative and unnecessary." With the first part of this answer their Lordships, for reasons which already sufficiently appear in this judgment, are in entire agreement, and they have already expressed themselves in regard to the statement referred to in the second part.

The Court of Appeal deemed it to be superfluous to answer the fourth question, as do their Lordships.

In the result, their Lordships agreeing in effect with all the answers of the Court of Appeal are of opinion that this Appeal from the judgment of that Court should be dismissed. They will humbly advise His Majesty accordingly.

(1) [1903] A. C. 524.

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Their Lordships do not propose to make any order with reference to the costs of the appeal. They think that all parties to it should bear their own.

Solicitors for appellant and intervener: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1925 — *Jan.* 20.

TORONTO ELECTRIC COMMISSIONERS APPELLANTS;

AND

SNIDER AND OTHERS . . . . . RESPONDENTS.

ATTORNEYS-GENERAL FOR CANADA AND ONTARIO . . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Legislative Power—Industrial Disputes—Property and Civil Rights in the Provinces—"Peace, order, and good government of Canada"—Industrial Disputes Investigation Act, 1907 (6 & 7 *Edw.* 7, *c.* 20, *Dom.*)—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

The Industrial Disputes Investigation Act, 1907, of Canada, provided that upon a dispute occurring between employers and employees in any of a large number of important industries in Canada the Minister for Labour for the Dominion might appoint a Board of Investigation and Conciliation. The Board was to make investigations, with power to summon witnesses and inspect documents and premises, and was to try to bring about a settlement; if no settlement resulted, they were to make a report with recommendations as to fair terms, but the report was not to be binding upon the parties. After a reference to a Board a lock-out or strike was to be unlawful, and subject to penalties:—

Held, that the Act was not within the competence of the Parliament of Canada under the British North America Act, 1867. It clearly was in relation to property and civil rights in the Provinces, a subject reserved to the Provincial Legislatures by s. 92, sub-s. 13, and was not within any of the overriding powers of the Dominion Legislature specifically

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* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD SALVESEN.

set out in s. 91; the Act could not be justified under the general power in s. 91 to make laws "for the peace, order, and good government of Canada," as it was not established that there existed in the matter any emergency which put the national life of Canada in unanticipated peril.

Russell v. *The Queen* (1882) 7 App. Cas. 829, in the light of later decisions, can be supported only upon the assumption that the Judicial Committee considered that when the Dominion Act then in question was passed the evil of intemperance amounted in Canada to an emergency of the kind above mentioned.

In re Board of Commerce Act, 1919 [1922] 1 A. C. 191 followed; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923] A.C. 695 distinguished.

Judgment of the Supreme Court (55 Ont. L. R. 454) reversed.

APPEAL (No. 99 of 1924) by special leave from a judgment of the Supreme Court of Ontario, Appellate Division, dated April 22, 1924, affirming a judgment of Mowat J.

The appellants were a Board of Commissioners appointed under an Act of Ontario to manage the municipal electric light, power, and heat works in Toronto, and had the duties and powers of commissioners under the Public Utilities Act (R. S. Ont., 1914, c. 204). The respondents constituted a Board appointed on the application of employees of the appellants by the Minister for Labour for the Dominion under the Industrial Disputes Investigation Act, 1907 (6 & 7 Edw. 7, c. 20, Dom.), an Act "to aid in the prevention and settlement of strikes and lock-outs in mines and industries connected with public utilities."

The appellants on August 21, 1923, commenced an action in the Supreme Court of Ontario claiming a declaration that the respondents were acting without lawful authority, and for an injunction.

Orde J. granted an interlocutory judgment restraining the defendants until the trial from entering upon the plaintiffs' premises, or exercising any of the compulsory powers purporting to be given to them as a Board by ss. 30 to 38 of the Industrial Disputes Investigation Act, 1907, of Canada. The learned judge was of opinion that the Act was ultra vires the Parliament of Canada.

The action was tried by Mowat J. in November, 1924, the Attorneys-General for Canada and for Ontario being

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heard as interveners. The learned judge was of opinion that the Act of 1907 was within the competence of the Parliament of Canada; as he differed from Orde J. he referred the action to the Appellate Division under ss. 3 and 4 of the Judicature Act (R. S. Ont., c. 56).

The Appellate Division (Hodgins J.A. dissenting) affirmed the view of Mowat J. and dismissed the action.

The reasons of the learned judges appear from the judgment of the Judicial Committee.

The appeal to the Appellate Division is reported at 55 Ont. L. R. 454.

1924. Nov. 14, 18, 20, 21, 24. *Stuart Bevan K.C.*, *Hon. Geoffrey Lawrence* and *J. R. Robinson* for the appellants, and for the Attorney-General for Ontario. The Act of 1907 was ultra vires the Dominion Parliament under the British North America Act, 1867. It interfered seriously with civil rights in the Provinces, a subject within the exclusive powers of the Provincial Legislatures under s. 92, head 13: *Citizens Insurance Co.* v. *Parsons* (1); *In re Board of Commerce Act.* (2) Further, the appellants were a municipal institution, and subject under s. 92, head 8, to the same exclusive powers. The imposition of penalties did not bring the Act within the power of the Dominion under s. 91, head 27, as to criminal law: *Attorney-General for Ontario* v. *Reciprocal Insurers* (3); nor does it fall within head 2, the "regulation of trade and commerce." Even if the subject is either trade or commerce, head 2 does not entitle interference with particular trades: *Citizens Insurance Co.* v. *Parsons* (1); *John Deere Plow Co.* v. *Wharton.* (4) As there was no overlapping of the two powers, the principle applied in *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (5), and the two decisions there followed, does not apply. The Act being in relation to matters specified in s. 92, the general power of the Parliament of Canada to pass laws for the "peace, order, and good

(1) (1881) 7 App. Cas. 96.
(2) [1922] 1 A. C. 191.
(3) [1924] A. C. 328.
(4) [1915] A. C. 330, 340.
(5) [1907] A. C. 65.

government of Canada" cannot be invoked: *Prohibition* case (1); *Insurance Act Case* (2); *In re Board of Commerce Act.* (3) *Russell* v. *The Queen* (4) was decided upon the basis that the Act there in question was not really within any of the enumerations in ss. 91 and 92; it has been explained in *Hodge* v. *The Queen* (5), *Attorney-General for Canada* v. *Attorney-General for Alberta* (6), and *In re Board of Commerce Act.* (7) The last named decision cannot be distinguished; it shows that Dominion legislation which interferes with civil rights in the Provinces can only be justified where there are very exceptional circumstances amounting to a national peril, whereby the matter transcends the subjects enumerated in s. 92; and that Dominion wide importance is not of itself sufficient to bring the general words into operation. Here the evidence does not show that there was any emergency or peril, such as was referred to in that case, and was held to have existed in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (8) The Provincial Legislaturesc ould have provided legislation adequate to deal with the matter.

Sir John Simon K.C. and *Lewis Duncan* for the respondents. The Act was not "in relation to matters coming within the classes of subjects" enumerated in s. 92. An Act may interfere with property or civil rights without being "in relation to" that subject within the meaning of s. 92; the real question is as to the "aspect" in which an Act is to be regarded. The British North America Act, 1867, s. 91, assigns the subject of the criminal law to the Dominion. No reference was made to industrial disputes, because the criminal law of England as it existed in 1792, under which strikes were unlawful, was part of the law of Canada by 40 Geo. 3, c. 1, s. 1; and by an Act of Canada of 1824 (5 Geo. 3, c. 95) the law of England as to combinations remained in force save so far as it might be modified by the Criminal Code of Canada. With regard to the law in England, see per Erle J.

(1) [1896] A. C. 348, 366.
(2) [1916] 1 A. C. 588, 595.
(3) [1922] 1 A. C. 191, 197.
(4) 7 App. Cas. 829.
(5) (1883) 9 App. Cas. 117.
(6) [1916] 1 A. C. 588.
(7) [1922] 1 A. C. 191.
(8) [1923] A. C. 695.

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in *Reg.* v. *Rowlands* (1) and Stephen's History of the Criminal Law, vol. iii., pp. 203 et seq. The Act now under discussion in its pith and substance is one dealing with the criminal law, and not one in relation to civil rights. Every Act dealing with the criminal law necessarily touches on civil rights. The Act was competent within the principle followed in *Russell* v. *The Queen*. (2) It dealt with a matter which was "of Canadian interest and importance": see per Lord Watson in the *Prohibition* case. (3) Owing to the absence of any economic division between the Provinces, the matter could only be dealt with effectively by Dominion legislation. The Act was therefore competent within the general power to make laws for the peace, order, and good government of Canada. The *Board of Commerce* case (4) is distinguishable; there the direct object of the Act was to prevent people from exercising the most ordinary civil rights, here any interference with civil rights is merely incidental. [Reference was made also to Lefroy, Legislative Power in Canada, prop. 34; Kennedy, Constitution of Canada, p. 303.]

Clauson K.C. (*James Wylie* with him) for the Attorney-General for Canada supported the arguments for the respondents.

Stuart Bevan K.C. replied.

1925. Jan. 20. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that

(1) (1851) 5 Cox, C. C. 436, 461.
(2) 7 App. Cas. 829.
(3) [1896] A. C. 348, 360.
(4) [1922] 1 A. C. 191.

conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of its terms that has now been established by a series of authorities. They have had the advantage not only of hearing full arguments on the question, but of having before them judgments in the Courts of Ontario, from which this appeal to the Sovereign in Council came directly. Some of these judgments are against the view which they themselves take, others are in favour of it, but all of them are of a high degree of thoroughness and ability.

The particular exercise of legislative power with which their Lordships are concerned is contained in a well-known Act, passed by the Dominion Parliament in 1907, and known as the Industrial Disputes Investigation Act. As it now stands it has been amended by subsequent Acts, but nothing turns, for the purposes of the question now raised, on any of the amendments that have been introduced.

The primary object of the Act was to enable industrial disputes between any employer in Canada and any one or more of his employees, as to "matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights and duties of employers or employees (not involving any such violation thereof as constitutes an indictable offence)," relating to wages or remuneration, or hours of employment; sex, age or qualifications of employees, and the mode, terms and conditions of employment; the employment of children or any person, or classes of persons; claims as to whether preference of employment should be given to members of labour or other organizations; materials supplied or damage done to work; customs or usages, either general or in particular districts; and the interpretation of agreements. Either of the parties to any such dispute was empowered by the Act to apply to the Minister of Labour for the Dominion for the appointment of a Board of Conciliation and Investigation, to which Board the dispute might be referred. The Act enabled the Governor in Council to appoint a Registrar of such Boards, with the duty of dealing with all applications for reference, bringing them to the notice of the

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Minister, and conducting the correspondence necessary for the constitution of the Boards. The Minister was empowered to establish a Board when he thought fit, and no question was to be raised in any Court interfering with his decision. Each Board was to consist of three members, to be appointed by the Minister, one on the recommendation of the employer, one on that of the employees, and the third, who was to be chairman, on the recommendation of the members so chosen. If any of them failed in this duty the Minister was to make the appointment. The department of the Minister of Labour was to provide the staffs required. The application for a Board was to be accompanied by a statutory declaration showing that, failing adjustment, a lock-out or strike would probably occur.

The Board so constituted was to make inquiry and to endeavour to effect a settlement. If the parties came to a settlement the Board was to embody it in a memorandum of recommendation which, if the parties had agreed to it in writing, was to have the effect of an award on a reference to arbitration or one made under the order of a Court of record. In such a case the recommendation could be constituted a rule of Court and enforced accordingly. If no such settlement was arrived at, then the Board was to make a full report and a recommendation for settlement to the Minister, who was to make it public.

The Boards set up were given powers to summon and to enforce the attendance of witnesses, to administer oaths and to call for business books and other documents, and also to order into custody or subject to fine, in case of disobedience or contempt. The Board was also empowered to enter any premises where anything was taking place which was the subject of the reference and to inspect. This power was also enforceable by penalty. The parties were to be represented before the Board, but no counsel or solicitors were to appear excepting by consent and subject to the sanction of the Board itself. The proceedings were normally to take place in public.

By s. 56 of the Act, in the event of a reference to a Board,

it was made unlawful for the employer to lock-out or for the employees to strike on account of any dispute prior to or pending the reference, and any breach of this provision was made punishable by fine. By s. 57, employers and employed were both bound to give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours. In the event of a dispute arising over the intended change, until the dispute had been finally dealt with by a Board and a report had been made, neither employers nor employed were to alter the conditions, or lock-out or strike, or suspend employment or work, and the relationship of employer and employee was to continue uninterrupted. If, in the opinion of the Board, either party were to use this or any other provision of the Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board were so to report to the Minister, such party was to be guilty of an offence and liable to penalties.

By s. 63 (*a*), where a strike or lock-out had occurred or was threatened, the Minister was empowered, although neither of the parties to the dispute had applied for one, to set up a Board. He might also, under the next section, without any application, institute an inquiry.

Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. It set up a Board of Inquiry which could summon them before it, administer to them oaths, call for their papers and enter their premises. It did no more than what a Provincial Legislature could have done under head 15 of s. 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by s. 56, it suspended liberty to lock-out or strike during a reference to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario,

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excepting one provision. The field for the operation of the Act was made the whole of Canada.

In 1914 the Legislature of the Province of Ontario passed a Trade Disputes Act which substantially covered the whole of these matters, so far as Ontario was concerned, excepting in certain minor particulars. One of these was the interference in the Dominion Act with the right to lock-out or strike during an inquiry. This was not reproduced in the Ontario Act. Another difference was the necessary one that the operation of the Ontario Act was confined to that Province, instead of extending to other parts of Canada. It was, of course, open to the Legislatures of the other Provinces to enact similar provisions, and some of them appear to have done so.

Subject to variations such as these there is, in the Ontario Act, little alteration in substance of the provisions of the Dominion statute. The Lieutenant-Governor of the Province, instead of the Minister of Labour, appoints the Registrar. There are to be set up two different kinds of statutory Council, one of Conciliation, the four members of which are to be nominated by the parties, the other a Council of Arbitration, consisting of three members, two of whom are to be appointed by the Lieutenant-Governor of the Province on the recommendation of the parties, and the third, the chairman, to be nominated by the Lieutenant-Governor on failure of the parties to agree and name. The mayor of any city or town in the Province, on being notified that a strike or lock-out is impending, may inform the Registrar of the fact, and a Council of Arbitration may then be empowered to inquire and to mediate. Unless there is an agreement by one or both of the parties, in which case the award of the Council may be enforced as on an arbitration, there is no power given to suspend the right to strike or lock-out.

It is clear that this enactment was one which was competent to the Legislature of a Province under s. 92. In the present case the substance of it was possibly competent, not merely under the head of property and civil rights in the Province, but also under that of municipal institutions in the Province.

For the appellants are incorporated, by the Province, a Public Utility Commission within the definition in ch. 204 of the Revised Statutes of Ontario, 1914, relating to the constitution and operation of works for supplying public utilities by municipal corporations and companies, and are employers within the meaning of the Ontario Trade Disputes Act already referred to. Their function is to manage the municipal electric light, heat, and power works of the City of Toronto.

The primary respondents in this appeal are the members of a Board of Conciliation appointed by the Dominion Minister of Labour under the Act first referred to. There was a dispute in 1923 between the appellants and a number of the men whom they employed, which dispute was referred to the first respondents, who proceeded to exercise the powers given by the Dominion Act. The appellants then commenced an action in the Supreme Court of Ontario for an injunction to restrain these proceedings, on the allegation that the Dominion Act was ultra vires. The Attorneys-General of Canada and of Ontario were notified and made parties as intervenants.

There was a motion for an interim injunction, which was heard by Orde J., who, after argument, granted an injunction till the trial. The action was tried by Mowat J., who intimated his dissent from the view of the British North America Act taken by Orde J., who was co-ordinate in authority with him, according to which view the Dominion Act was ultra vires. He, therefore, as he had power by the Provincial Judicature Act to do, directed the action to be heard by a Divisional Court, and it was ultimately heard by the Appellate Division of the Supreme Court of Ontario (Mulock C.J., Magee, Hodgins, Ferguson and Smith JJ.A.). The result was that by the majority (Hodgins J.A. dissenting) the action of the appellants was dismissed.

The broad grounds of the judgment of the majority, which will be referred to later on, was that the Dominion Act was not a law relating to matters as to which s. 92 conferred exclusive jurisdiction, but was a law within the competence of the Dominion Parliament, inasmuch as it was directed to

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the regulation of trade and commerce throughout Canada, and to the protection of the national peace, order and good government, by reason of (*a*) confining, within limits, a dispute which might spread over all the Provinces ; (*b*) informing the general public in Canada of the nature of the dispute ; and (*c*) bringing public opinion to bear on it. The power of the Dominion Parliament to legislate in relation to criminal law, under head 27 of s. 91, was also considered to apply.

Before referring to these grounds of judgment their Lordships, without repeating at length what has been laid down by them in earlier cases, desire to refer briefly to the construction which, in their opinion, has been authoritatively put on ss. 91 and 92 by the more recent decisions of the Judicial Committee. The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

Applying this principle, does the subject of the legislation in controversy fall fully within s. 92 ? For the reasons already given their Lordships think that it clearly does. If so, is the exclusive power prima facie conferred on the Province trenched on by any of the over-riding powers set out specifically in s. 91 ? It was, among other things, contended in the argument that the Dominion Act now challenged was authorized under head 27, " the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." It was further suggested

in the argument that the power so conferred is aided by the power conferred on the Parliament of Canada to establish additional Courts for the better administration of the laws of Canada.

But their Lordships are unable to accede to these contentions. They think that they cannot now be maintained successfully, in view of a series of decisions in which this Board has laid down the interpretation of s. 91, head 27, in the British North America Act on the point. In the most recent of these cases, *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), Duff J. stated definitely the true interpretation, in delivering the judgment of the Judicial Committee. Summing up the effect of the series of previous decisions relating to the point, he said: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

In the earlier *Board of Commerce* case (2) the principle to be applied was laid down in the same way. It was pointed out that the Dominion had exclusive legislative power to create new crimes "where the subject matter is one which, by its very nature, belongs to the domain of criminal jurisprudence." But "it is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application."

Their Lordships are of opinion that, on authority as well as on principle, they are to-day precluded from accepting the arguments that the Dominion Act in controversy can be justified

(1) [1924] A. C. 328, 342. (2) [1922] 1 A. C. 191.

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as being an exercise of the Dominion power under s. 91 in relation to criminal law. What the Industrial Disputes Investigation Act, which the Dominion Parliament passed in 1907, aimed at accomplishing was to enable the Dominion Government to appoint anywhere in Canada a Board of Conciliation and Investigation to which the dispute between an employer and his employees might be referred. The Board was to have power to enforce the attendance of witnesses and to compel the production of documents. It could under the Act enter premises, interrogate the persons there, and inspect the work. It rendered it unlawful for an employer to lock-out or for a workman to strike, on account of the dispute, prior to or during the reference, and imposed an obligation on employees and employers to give thirty days' notice of any intended change affecting wages or hours. Until the reference was concluded neither were to alter the conditions with respect to these. It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime. Moreover, the employer retains under the general common law a right to lock-out, only slightly interfered with by the penalty. In this connection their Lordships are therefore of opinion that the validity of the Act cannot be sustained.

The point was also put in a somewhat different form. It was said that the criminal law of Canada was in its foundation the criminal law of England as at September 17, 1792; that, according to the criminal law of England as at that date, a strike was indictable as a conspiracy; that, consequently, strikes were within the ambit of the criminal law; and that, as a law either declaring strikes illegal as at common law, or making them illegal would be a proper enactment of the criminal law, so, though this is a rather a non sequitur, it was only a branch of that law to enact provisions which should have the effect of preventing strikes coming into existence.

It is not necessary to investigate or determine whether a strike is per se a crime according to the law of England in 1792. A great deal has been said on the subject and contrary opinions expressed. Let it be assumed that it was. It certainly was so only on the ground of conspiracy. But there is no conspiracy involved in a lock-out; and the statute under discussion deals with lock-outs pari ratione as with strikes. It would be impossible, even if it were desirable, to separate the provisions as to strikes from those as to lock-outs, so as to make the one fall under the criminal law while the other remained outside it; and, therefore, in their Lordships' opinion this argument also fails.

Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. In *Citizens Insurance Co.* v. *Parsons* (1) it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce. The Dominion power has a really definite effect when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada. This was shown in the decision in *John Deere Plow Co.* v. *Wharton.* (2) The same thing is true of the exercise of an emergency power required, as on the occasion of war, in the interest of Canada as a whole,

(1) 7 App. Cas. 96, 112. (2) [1915] A. C. 330, 340.

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a power which may operate outside the specific enumerations in both ss. 91 and 92. And it was observed in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), in reference to attempted Dominion legislation about insurance, that it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation, for instance, by a licensing system, of a particular trade in which Canadians would otherwise be free to engage in the Provinces. (1) It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

A more difficult question arises with reference to the initial words of s. 91, which enable the Parliament of Canada to make laws for the peace, order and good government of Canada in matters falling outside the Provincial powers specifically conferred by s. 92. For *Russell* v. *The Queen* (2) was a decision in which the Judicial Committee said that it was within the competency of the Dominion Parliament to establish a uniform system for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. It has been observed subsequently by this Committee that it is now clear that it was on the ground that the subject matter lay outside Provincial powers, and not on the ground that it was authorized as legislation for the regulation of trade and commerce, that the Canada Temperance Act was sustained: see *Attorney-General for Canada* v. *Attorney-General for Alberta*. (3) But even on this footing it is not easy to reconcile the decision in *Russell* v. *The Queen* (2) with the subsequent decision in *Hodge* v. *The Queen* (4) that the Ontario Liquor Licence Act, with the powers of regulation which it entrusted to local authorities in the Province, was intra vires of the Ontario Legislature. Still more difficult is it to reconcile *Russell* v. *The Queen* (2) with the decision given later by the

(1) [1916] 1 A. C. 588, 596.
(2) 7 App. Cas. 829.
(3) [1916] 1 A. C. 588, 595.
(4) 9 App. Cas. 117.

Judicial Committee that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout the Dominion, was ultra vires of the Dominion Parliament. As to this last decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their conclusion. They did not in terms dissent from the reasons given in *Russell* v. *The Queen*. (1) They may have thought that the case was binding on them as deciding that the particular Canada Temperance Act of 1886 had been conclusively held valid, on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole. The McCarthy Act, already referred to, which was decided to have been ultra vires of the Dominion Parliament, was dealt with in the end of 1885. Ten years subsequently another powerful Board decided *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, known as the *Distillers' and Brewers'* case. (2) Lord Herschell and Lord Davey, who had been the leading counsel in the *McCarthy* case, sat on that Board, along with Lord Halsbury, who had presided at it. In delivering the judgment, Lord Watson used in the latter case significant language (3): "The judgment of this Board in *Russell* v. *The Queen* (1), has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament." That decision, he said, must be accepted as an authority to the extent to which it goes—namely, that "the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any Provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada."

The Board held that, on that occasion, they could, not inconsistently with *Russell* v. *The Queen* (1), declare a statute of the Ontario Legislature establishing Provincial liquor

(1) 7 App. Cas. 829. (2) [1896] A. C. 348, 362. (3) Ibid. 362.

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prohibitions, to be within the competence of a Provincial Legislature, provided that the locality had not already adopted the provisions of the Dominion Act of 1886.

It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* (1) as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (2) are highly exceptional. Their Lordships think that the decision in *Russell* v. *The Queen* (3) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen* (3), that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case (4) that the evil of profiteering could

(1) 7 App. Cas. 829.
(2) [1923] A. C. 695.
(3) 7 App. Cas. 829.
(4) [1922] 1 A. C. 191.

not have been so invoked, for Provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell* v. *The Queen* (1) as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

The judgments in the Courts below express differing views. Orde J. granted an interim injunction, restraining the first respondents from interfering with the business of the appellants and from entering on their premises, or examining their works or employees, and from exercising their compulsory powers as a Board of Conciliation and Investigation under the Dominion Act, and from interfering with the property and civil or municipal rights of the appellants. He held that the Dominion legislation interfered with Provincial rights under s. 92 in a fashion which could not be supported under any of the enumerated heads in s. 91, and therefore could not be sustained by invoking the general words with which that section commences. The decision in the *Fort Frances Pulp* case (2) afforded no analogy on which such a contention as this last could be based.

Mowat J., dissenting from this reasoning, referred the trial of the action to a Divisional Court. He thought that the legislation in question was a matter of national importance, dealing with a subject which affected the body politic of the Dominion, as in *Russell* v. *The Queen*. (1)

In the Appellate Division, Mulock C.J., Smith J.A. and Magee J.A. concurred in the judgment delivered by Ferguson J.A. That learned judge held that the Act in question was not, "in its pith and substance," an Act relating to merely Provincial matters falling within s. 92, but related to industrial disputes which might develop into disputes affecting, not only the immediate parties, but the national welfare, peace, order and safety. He cited the analogy of the Australian Constitution Act, which, by s. 51, placed such disputes within the competence of the Australian Parliament when they extended beyond the limits of any single state. He was of opinion that, even if the Dominion legislation

(1) 7 App. Cas. 829. (2) [1923] A. C. 695.

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actually interfered with Provincial powers, it might be supported if necessary as dealing with the interests of the peace, order and good government of Canada, but he thought that it was necessary to go further in point of principle than to treat *Russell* v. *The Queen* (1) as showing that, where an abnormal condition in a great emergency demanded it, the Parliament of Canada might legislate for such a case without even trenching on the powers allocated to the Provinces under s. 92. He also thought that the Act was not one to control or regulate contractual or civil rights, but that its object was to authorize inquiry into conditions or disputes, and that the prevention of crimes, the protection of public safety, peace and order, and the protection of trade and commerce, were of its pith and substance and paramount purpose. The Act could also be supported as Dominion legislation under the over-riding enumerated heads of s. 91, as being legislation in relation to the regulation of trade and commerce, and also to the criminal law.

Hodgins J.A. dissented. In his view, industrial strife was nothing more than the result of an undesirable use of the civil right to cease work in the operation of various businesses. The argument in support of the Act was practically an endeavour to invent a new field, which was only a department or development of one of those exclusively possessed by Provincial Legislatures. Nor was the matter made better by the contention that the Act, when examined in the light of the evidence adduced, dealt with a subject which transcended Provincial limits and was of Dominion importance. It was, no doubt, true that owing to the highly organized methods of modern labour, strikes might spread and extend to other businesses. This might happen, and the state of things might conceivably reach a height in which it became comparable to war, famine or rebellion, and justify Dominion action. But on the only facts proved, in the learned judge's view, this Act could not be supported as dealing with a case of (1.) emergency, or (2.) general Canadian interest and importance, or (3) with a power conferred under any of the

(1) 7 App. Cas. 829.

enumerated heads in s. 91. No great national emergency was shown to have existed when the statute was enacted in 1907, or to have occurred since, and the statute was not framed so as to come into operation only when such emergency arose. The statute was further not framed so as to confer the drastic powers that would be necessary in such a case, but was based on the normal working of industrial relations which often required time and patience and some restraint, if dislocation was to be avoided. It was essentially a sedative measure. The special and exceptional conditions of emergency required by the judgments in the *Board of Commerce* case (1) and the *Fort Frances Pulp* case (2) did not appear to him to have existed in point of fact. So far as anticipations of changes in the future were concerned, Hodgins J.A. thought that the question was whether regulation of civil rights or invasion of property rights in the fashion provided by the Act, in order to bring about a uniform and desirable method of dealing with industrial disputes, admirable as its purpose might be, could be valid in view of the exercise of the powers given to the Provinces. That the Provinces had such powers, as complete as those in this Act given to the Dominion, he entertained no doubt. Several Provinces had on their statute books legislation of much the same kind. Even granting the national importance of the question, the whole success of this method of dealing with it depended on the capacity to seize on local disputes and their conditions, and to manage the exercise of civil rights in relation to them. The circumstance that the dispute might spread to other Provinces was not enough in itself to justify Dominion interference, if such interference affected property and civil rights. The Province in the present case was simply the scene of municipal action. As the result of his consideration of the principles laid down for the interpretation of the British North America Act, the learned judge was of opinion that the Act could not stand.

Their Lordships have examined the evidence produced at the trial. They concur in the view taken of it by Hodgins J.A. They are of opinion that it does not prove any emergency

(1) [1922] 1 A. C. 191. (2) [1923] A. C. 695.

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putting the national life of Canada in unanticipated peril such as the Board which decided *Russell* v. *The Queen* (1) may be considered to have had before their minds.

As the result of consideration, their Lordships have come to the conclusion that they ought humbly to advise the Sovereign that the appeal should be allowed, and that judgment should be entered for the appellants for the declaration and injunction claimed. There should be no costs, either of this appeal or in the Courts below, and any costs paid under the judgment of the Appellate Division of the Supreme Court ought to be repaid.

Solicitors for appellants and for the Attorney-General for Ontario: *Blake & Redden.*

Solicitors for respondents and for the Attorney-General for Canada: *Charles Russell & Co.*

Desain (Marquis) v. *Viani* [1925] A. C. 416
Referred to. GEORGE CASSAR DESAIN *v.* JAMES CASSAR DESAIN VIANI AND OTHERS [1948] A. C. 18

[PRIVY COUNCIL.]

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MARQUIS RICCARDO CASSAR DESAIN . APPELLANT;

AND

THE NOBLE PIETRO DEI BARONI TESTAFERRATA MORONI VIANI . } RESPONDENT.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

Malta — Primogenitura — Descent — Construction of Deed — Per lineam masculinam — Exclusion of legitimated Children — Title through legitimated Person—Jus tertii.

The appellant claimed from the respondent, who was in possession, a Maltese primogenitura founded by a deed executed in 1775. The deed provided that the primogenitura should descend, in the order of a regular primogenitura, to male descendants in the male line. It

(1) 7 App. Cas. 829.

* *Present:* LORD BLANESBURGH, MR. JUSTICE DUFF, and SIR ADRIAN KNOX.

excluded illegitimate children, even if legitimated by subsequent marriage, but the exclusion of legitimated children was subject to certain exceptions. The appellant's title was entirely through males, but one of the ancestors through whom he claimed had been legitimated. The respondent asserted that his own title, which was through a female, was superior to that of the appellant; he contended also that the appellant's claim was barred as against his own possession by the better title of a third person. That person had been entitled to the estate since 1892. He was, however, in possession of another estate which could not be held with that now in dispute, and he had made no claim, although there had been opportunities for him to do so:—

Held, (1.) that the vocation of males in the male line showed that the intention of the founder was to call only males descended through males; and that accordingly the provision that the descent was to be in the order of a regular primogenitura related merely to the preference as to line, degree, and age, between persons so descended.

D'Amico v. *Trigona* (1888) 13 App. Cas. 806 followed.

(2.) That although, according to Maltese law, an exclusion of legitimated persons from descent is to be strictly construed, the preponderance of authority showed that it extends to those claiming through a legitimated person; but that the appellant came within the exceptions expressly provided by the deed.

(3.) That the appellant's claim was not barred by the title of the third person. The primogenitura did not vest ipso jure; and having regard to the long period during which the third person had abstained from accepting the responsibilities of the primogenitura, he had no interest in it.

Judgment of the Court of Appeal reversed upon the point last mentioned.

CONSOLIDATED CROSS-APPEALS (No. 150 of 1923) from a judgment of the Court of Appeal, Malta (January 29, 1923), reversing in part a judgment of the First Hall of the Civil Court (December 16, 1918) in favour of the defendant, but absolving the defendant from the instance.

The litigation related to the descent of a Maltese primogenitura founded by a notarial deed dated May 28, 1775. The above-named appellant by his libel filed in the First Hall of the Civil Court claimed a declaration that he had a stronger claim to the primogenitura than the father of the above-named respondent, and that the latter should be condemned to relinquish in favour of the plaintiff all the property constituting the endowment of the primogenitura, with the income accrued after the service of the libel. The present respondent was substituted as defendant upon the death of his father.

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The facts of the case, including the material terms of the deed of foundation, appear from the judgment of the Judicial Committee.

The case was heard in the First Hall by Micallef J., who held that the plaintiff's claim failed.

The Court of Appeal (Rafalo, Agius, and Camilieri JJ.) disagreed with the view of the trial judge that the defendant's title was superior to that of the plaintiff, but held that the plaintiff's claim was premature owing to the existence of a stranger to the suit who had a better title than the plaintiff; the Court accordingly absolved the defendant from the instance.

The plaintiff appealed, claiming that his title being made out as against the respondent he should not be debarred from obtaining the primogenitura by reason of the rights of a stranger to the suit. The defendant also appealed, claiming that the plaintiff's claim should have been dismissed in toto, on the grounds that he was excluded by the terms of the deed, and that his title was thereunder inferior to that of the defendant.

1924. Aug. 4, 5, 7. *W. A. Greene K.C.* and *Colombos* for the appellant. It is open to the founder of a primogenitura to establish a line of descent differing from that of a regular primogenitura: *Strickland* v. *Marchese Felicissimo Apap*. (1) The vocations of males in lineam masculinam excluded not only females but also those claiming through a female: *D'Amico* v. *Trigona* (2); Rota Recentiores, dec. 575, pt. 19, vol. 2, n. 13; Peregrinus, De Fideicommissis, art. 26, nn. 1, 2; Fusarius, De Fideicommissis, sub. quaest. 346, n. 32; Bichio, dec. 493; Sardinian Decisions, Dec. 18, 1746, see Pratica Legale, pt. 2, vol. 5, fol. 441; Joannis Torre, Variarum Juris Quaestionum, tom. 1, tit. 2, qu. 40, p. 419. Here "in lineam masculinam" cannot mean merely a line beginning with a male, because the words are used in relation only to the descendants of sons. By Maltese law children legitimated by subsequent marriage are ordinarily equal in

(1) (1882) 8 App. Cas. 106. (2) 13 App. Cas. 806.

all respects to those lawfully born; they can be excluded only by clear language: Peregrinus, art. 24, No. 8; Tiraquello, fol. 96, No. 569 xxxiii.; Merlino, De Legitima, lib. 1, qu. 7, n. 1; Fusarius, qu. 409, n. 22; Cinotomo, De Successione, lib. 3, tit. 1, p. 220; Urceolus, Consultationes Forenses, tom. 1, pars 2, c. 57. There is no exclusion in terms of those claiming through a legitimated person. In any case the plaintiff comes within the exceptions expressed by the deed. The existence of a third party who has a better title but has not claimed is no bar to the appellant's rights in the action. A person entitled under the deed does not take ipso juris, but only upon claiming. [On this point reference was made to the authorities set out in the judgment.] Further, the fact that the third person holds an incompatible primogenitura excludes him: Torre, Variarum Juris Quaestionum, tom. 1, tit. 1, qu. 4; ibid. tom. 2, tit. 6, qu. 6. The Court of Appeal erred in treating the claim as one to the dominium, whereas it was one to the usufructuary enjoyment under the fideicommissum. Actio rei vindicatoria is not applicable to the enforcement of a fideicommissum, which is a personal claim: Sohm, Institutes, 2nd ed., pp. 346, 537, 538.

Sir John Simon K.C. and *Hon. Geoffrey Lawrence* for the respondent. The deed provides that the descent is to be in the order of a regular primogenitura, that is to say with preference to line, degree, sex, and age, in the order stated; if the deed as a whole can be construed to accord with that it should be so construed: *Strickland* v. *Marchese Felicissimo Apap.* (1) The male line referred to in the deed is the line founded by male children of the sons of Donn' Anna Maria. Even if females are themselves excluded, males who would succeed under a regular primogenitura are not excluded by reason of being descended through a female. The deed, as a whole, does not indicate that the descent was to be purely agnatic. [Reference was made to: De Luca, De Linea Legale, art. 16; Bonfinio, De Fideicommissis, bk. 3, dec. 127; *Sayer* v. *Bradly.* (2)] The defendant being in possession, the plaintiff cannot succeed in the primogenitura having regard to the

(1) 8 App. Cas. 106.

(3) (1856) 5 H. L. C. 873.

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superior title of Lorenzo. There is nothing to prevent him from abandoning the incompatible primogenitura which he holds at present. The authorities do not establish that the interest of the holder of a primogenitura is less than dominium.

W. A. Greene K.C. replied.

1925. Jan. 20. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This is an appeal and cross-appeal from a judgment and order of the Court of Appeal for the Island of Malta and its Dependencies dated January 29, 1923, which, while in the result affirming a judgment of the First Hall of the Civil Court of Malta dated December 16, 1918, did incidentally reject all but one of the grounds of substance on which that judgment had been based. Each Court actually absolved the defendant—the present respondent—from the instance. But, in the First Hall, the absolvitur proceeded on a decision in the defendant's favour of all the main issues canvassed in the suit: in the Court of Appeal on the decision in his favour of one of these issues only. This appeal by the plaintiff is confined to so much of the order of the Court of Appeal as was adverse to himself. Objection to the rest of that order is taken by the defendant in his cross-appeal by which he seeks to have the judgment of the First Hall on every point restored. Thus it happens that all the questions raised in a suit commenced so long ago as August 10, 1911, are now either on the appeal or the cross-appeal brought to His Majesty in Council for final decision.

These questions depend for the most part upon the true construction of a formal notarial deed executed on May 28, 1775, whereby certain Maltese properties were erected into a "perpetual" primogenitura by the Baron Giovanni Batista Viani and his three sisters, the Noble Angelica, Maddalena and Olimpia Viani. Of these founders, the three ladies were spinsters, while the Baron at the date of the deed was a widower, with a family of two daughters, the Donna Francesca and the Donn' Anna Maria Viani Bonnici, wife of the

Marchese di San Vincenzo Ferreri. The Donna Francesca was, it appears, unmarried, but of the marriage of the Donn' Anna there were three sons, all living—namely, Giuseppe, born in 1767; Lorenzo, born in 1769; and Filippo, born in 1774. At the date of the deed therefore these three sons of the Donn' Anna were the only male descendants of any of the founders, and it is well to note that they were all in the female line.

It will be convenient at the outset to set forth textually those clauses of the deed upon which the discussion has mainly turned. They will thus stand for reference as this judgment proceeds. An English translation, accepted by both parties as accurate, has been used throughout the proceedings. Their Lordships will quote from that translation.

"3. . . . . all holders of the 'primogenitura' shall at all times bear in all public and private acts, and in their signature, the surname Viani in addition to their own and unite always to their own insignia the insignia of the Viani family.

"5. As stock of this 'primogenitura' (the founders) have nominated Donna Francesca Viani legitimate and natural first-born daughter of the said Baron and of the late Baroness Maria Teresa Bonnici Falzon, appointing her first holder of the property, and after her they call all her descendants in the order of a regular primogeniture in the manner hereunder mentioned, to wit, her first-born son and his male descendants in the male line (per lineam masculinam) up to the twentieth and thirtieth degree and in perpetuity; after these, they call the second-born son together with his male descendants in the male line also in perpetuity; and after these the third, fourth, fifth and sixth-born son together with his male descendants in the male line, always in the order of a regular perpetual primogeniture.

"6. In default of the male line of the male children (figli maschi) of the said Donna Francesca, the female children (figlie femmine) of her male children (figli maschi) and all their descendants shall succeed in the same order of primogeniture, with preference always of males to females, and of the first-born to the second and ulterior born son, and in

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every respect as has been established above for the first limitation (vocazione) of the male children (figli maschi), provided, however, that the succession shall restart from the first line of the first-born son, first called, preferably to the females nearer in degree to the person last called, and so on successively and gradually.

" 7. In case of failure both of the male and female lines of the said male children (figli maschi) the said Baron and his sisters direct that the female children (figlie femmine) of the said Donna Francesca Viani and all their descendants shall succeed in the very same order laid down above for the limitation of females descended from male children (figli maschi), which order is to be held as repeated here word for word.

" 8. And should the said Donna Francesca Viani have no children, male or female, then the said Baron and his sisters have substituted and called Donn' Anna Maria Viani Bonnici, wife of Mario Testaferrata, Marchese di San Vincenzo Ferreri, with all those substitutions, limitations, pacts, laws, rules and conditions which have been ordered and established for the limitation of the said Donna Francesca Viani, and not otherwise."

Clauses 9 and 10 make provision for the ingress of the primogenitura into the family of de Ollivier Viani, in default of all the lines specified in clauses 5 to 8.

" 13. From the said primogenitura the said founders exclude all those who perhaps were not born of a true and lawful marriage contracted according to the rites of Holy Church, even if they be legitimated by subsequent marriage or by privilege, be it also of Sovereign Princes or of the Supreme Pontiff, provided, however, that the descendants of the said Donna Francesca and Donn' Anna Maria Viani even if legitimated per subsequens matrimonium or per rescriptum principis to the exclusion of the said Donna Rosa and Donna Vincenza de Ollivier Viani and their descendants, may and shall enjoy the present primogenitura, not however to the exclusion of their brothers born of a true and lawful marriage.

" 14. Likewise if it should happen that there be one only

male of the primogenial line and such male be legitimated per subsequens matrimonium, then he may and shall enjoy without question the present primogenitura to the exclusion of any female born of a true and lawful marriage.

" 18. Although the intention and will of the founders is that the present ' primogenitura ' is to go to the first-born, nevertheless, if the latter's conduct is unbefitting his rank as knight, or what is more, as a good Christian, or if he contracts unequal marriage or against his parents' will, or if from the second-born more decorum to the family is hoped, in such cases the said Baron Viani and his sisters, wishing that the persons called by them be virtuous and moral, grant unto the said Donna Francesca and Donn' Anna Maria Viani and successively unto all the holders of the ' primogenitura,' the power to prefer the second-born son, and if the latter is also undeserving they give power to prefer the third-born, and so on successively ; but the founders request that this right of preference be not exercised without good cause and mature consideration, or with passion or mere predilection for the sons and daughters under age. The descendants, however, of the person debarred shall not be considered excluded when, on the extinction of the line of the person preferred, there be room for a new substitution."

Until the death of the Baron Dr. Giuseppe Testaferrata Viani, the third holder of the primogenitura, there was no room for doubt as to the proper devolution of the primogenial property. The Donna Francesca had died without issue, and the property devolved upon the Marquis Giuseppe, the eldest born of the Donn' Anna's three sons, that lady's line entering into the primogenitura under cl. 8 of the deed. The Marquis was succeeded by his only son Gilberto, as the second holder, and Gilberto by his only son, the Baron Dr. Giuseppe, who died without issue in April, 1892. It is not in dispute that thereupon the direct male line of the Marquis Giuseppe, the eldest born son of the Donn' Anna became extinct ; and, if the first limitation established by the third clause of the deed is a purely male agnatic descent from which all males descending from females and females themselves are excluded,

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as is the contention of the appellant, then, on the death of the Baron Dr. Giuseppe, the primogenitura ought to have made its ingress in the male line of Lorenzo (second born son of the Donn' Anna) or, failing that line, in the male line of Filippo—her third son—the line which the present plaintiff claims to represent.

In fact, however, the primogenial property was retained first, by the Noble Rosario, a nephew ex sorore, of the Baron Dr. Giuseppe, and second son of his deceased sister Angela. The Noble Rosario appears to have held possession certainly until 1903. Thereafter, in circumstances which are not disclosed in the papers before the Board and which have not been clearly explained to their Lordships, possession was taken by or given to the Noble Salvatore dei Baroni Testaferrata Moroni Viani, the elder brother of the Noble Rosario, and the father of the present respondent. Possession was retained by the Noble Salvatore until his death in September, 1911, about a month after the institution of these proceedings, and since his death it has been retained by his son, the respondent.

In 1910 an attempt to disturb that possession was made by the Noble Nicola Testaferrata de Noto, grandson of the Marquis Giuseppe, and son of the Marquis's daughter, Vincenza. He brought a suit against the Noble Salvatore to recover the primogenial property. In that suit however the Court of Appeal in a judgment dated June 27, 1910, after expressing views as to the true effect of the deed of foundation which the learned judges of that Court have repeated and indorsed in their judgment now under consideration, held that, in a question between the Noble Nicola and the Noble Salvatore, the latter was entitled to enjoy the property under an earlier vocation, and that, on that ground alone, the Noble Nicola had no claim to interfere with his possession.

Such, in his own view, at least, was not the present appellant's position, and he, on August 10, 1911, instituted these proceedings against the Noble Salvatore. Upon his death the suit was by decree dated November 3, 1911, transferred to his son, the present respondent, the Noble

Pietro Paolo Testaferrata Moroni Viani, and the appellant asks in it for a declaration that he has a stronger claim than the respondent to the enjoyment of this primogeniture and for consequential relief.

The respondent's place in the order of descent has already been described. The appellant's position in relation to him can only be appreciated on reference to the facts concerning the male line of Lorenzo, the second son of the Donn' Anna, and concerning also the male line of Filippo, her third son, of which line, as their Lordships have already said, the appellant claims to be the present representative.

Lorenzo, the second born son of the Donn' Anna, had an only son, Mario Filippo, and he by his marriage with Donna Vincenza Testaferrata had four sons, of whom the three eldest died without issue. The fourth son, the Noble Lorenzo Antonio dei Marchesi Testaferrata, is still living, descended, as thus appears from his grandfather Lorenzo, through an unbroken series of males. The Noble Lorenzo Antonio, however, has since 1874 held a primogenitura, distinguished in these proceedings as the "Testaferrata primogenitura," one condition of which is that the holder of the Viani primogeniture must never succeed to it and that the two primogenitures shall not meet in the same person. There have been at least three appropriate occasions since 1874, on which the Noble Lorenzo Antonio could have elected to abandon the Testaferrata primogenitura and claim the Viani primogenitura, and the judgment of the Court of Appeal in the present case shows, as did its judgment in 1910 in the case already referred to, that in the opinion of that Court there would be no answer to his claim if he made it. He has, however, never made the claim, presumably for very good reasons, which in view of the facts just stated are easy to conjecture. But he still lives, a not remote kinsman of both parties to the present proceedings. And in the view of the Court of Appeal—not of course shared by the respondent—the existence of the Noble Lorenzo Antonio is the one existing effective obstacle to the appellant's immediate success in this suit. Of that, however, hereafter.

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Filippo, the third born son of the Donn' Anna, married on August 19, 1807, Vincenza Fallanca. The appellant's case is that to these persons, before their marriage—namely, on August 26, 1805, was born their only son Lorenzo who was legitimated by the subsequent marriage of his parents. It is not suggested by the respondent or by any one else, that there was any subsequent issue of that marriage or any issue of Filippo other than Lorenzo. Lorenzo was the great-grandfather of the appellant—his grandfather, Filippo, being Lorenzo's only son, and his father—the Marquis Lorenzo Cassar Desain Testaferrata, being Filippo's only son. The appellant is the second but only surviving son of his father, the Marquis Lorenzo, his elder brother, the Marquis Filippo Giacomo, having died without issue on October 8, 1906.

With regard to the appellant's status it has throughout been contended by the respondent, as a preliminary objection of fact, that there is no sufficient evidence that the appellant's great-grandfather Lorenzo was in fact Filippo's son, and the learned judge of the First Hall took that view. His judgment on this matter, however, did not commend itself to the learned judges of the Court of Appeal, and little was urged in support of it before the Board. Their Lordships have carefully considered all the evidence upon the subject, and they concur unhesitatingly in the view of that evidence taken by the Court of Appeal. It is in their judgment established beyond the range of judicial doubt that Lorenzo was the son of Filippo and Vincenza Fallanca, and that he was duly legitimated and acquired the full status of legitimacy by the marriage of his parents on August 19, 1807. This objection, to the appellant's status, their Lordships accordingly reject. When rejected, it becomes indisputable that, subject to the effect upon Lorenzo and, separately, upon his line, of the fact that he was only legitimated by the subsequent marriage of his parents, the appellant is, under the deed of foundation here in question, the present representative of the line of Filippo, descended from him through an unbroken series of males. It is in that character that as against the respondent

he sets up in these proceedings the stronger claim to the enjoyment of the primogenial property.

To that claim the respondent, beyond the objection to the appellant's status with which their Lordships have just dealt, puts forward three separate answers :—

First.—He asserts in himself a right prior to that of the appellant to hold the " primogenitura."

Secondly.—He contends that the appellant as a person descended from an ancestor whose legitimacy was due only to the marriage of his parents subsequent to his birth is not within the vocation at all and can assert no claim under the deed of foundation.

Thirdly.—He urges that if, contrary to his second contention, the appellant is within the vocation, his claim, as against a person, like himself, in actual possession of the primogenial property, is barred by the right thereto of the Noble Lorenzo Antonio which, on the appellant's view of the deed of foundation, is necessarily prior to his own.

Each of these answers was accepted by the learned judge of the First Hall, as well founded and sufficient to defeat the appellant's claim. In the Court of Appeal, the third answer only was entertained favourably. The others were rejected. They will now be dealt with in their order.

Their Lordships, as a result of the argument before them, are left in some doubt as to the ground on which the first contention of the respondent is now rested. In the First Instance, the contention they think must have been—it was accepted by the learned judge—that by the limitation of the primogenial property successively to the first, second and subsequently born sons of—in the event—the Donn' Anna " and his male descendants in the male line up to the 20th and 30th degree and in perpetuity . . . . always in the order of a regular perpetual primogeniture," the founders meant only successive lines of substance from which the female is not excluded, although she is postponed to the male. Marked as is the contrast in language, and presumably in content, between the apparently restricted words " male descendants in the male line " in this vocation and the corresponding

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words " all their descendants " in the second and third vocations set forth in clauses 6 and 7 of the deed there is, in the learned judge's view, identity of devolution within each vocation. The words, " per lineam masculinam " in the first, merely mean a line beginning with a male as contrasted with what in cl. 7 is described as the linea feminina of cl. 6—a line beginning with a female. The first, like the other vocations, is governed by the words " always in the order of a regular primogeniture," by which is meant a primogeniture in which although males rank before females they do not exclude them, and even their priority is qualified by the rule that preference must always be given, first to the line, secondly to the degree within the line, and thirdly only to sex in case of equality of degree.

Now as to this, it is first of all a little difficult to see how in cl. 5 the words " per lineam masculinam," part of the expression " her first born son and his male descendants in the male line," can only mean a line beginning with a male when the first born son, a male, has already been named as the first person in the line. On that view the words are merely tautologous or redundant. But, further, a line beginning with a male is not in Maltese law the natural or ordinary meaning of the words " linea masculina." The phrase, says Lord Selborne, in *D'Amico* v. *Trigona* (1), properly means " a line commencing with a male and continued through males," and he continues : " Many authorities on that point were quoted at the bar; but it is sufficient to mention the definition of the Roman Rota, approved and adopted by Cardinal Luca (De Linea Legali lib. 2, art. 76 num. 5). ' Linea masculina inchoatur a masculis et continuat in masculos ; cum autem pervenerit ad feminas statim finitur,' to which the Cardinal adds : ' Linea masculina etenim est quae componitur simpliciter ex masculis absque intermixtione feminarum.' " In other words, if the phrase is to have attributed to it the limited meaning of a line commencing with a male—and no more—some context is required. And here the context is all the other way.

(1) 13 App. Cas. 806.

Again, as to the references in the section to a regular primogeniture, which formed the essential basis of the learned judge's decision—and there are, it will be seen, two such references—these do, their Lordships recognize, carry one step further in the case of this primogenitura the usual presumption in favour of a primogeniture being regular which apart from these references altogether would by Maltese law apply to it. It must, however, in this connection, also be remembered that by the same law founders of a primogenitura may, if they please, displace the regular order of succession, and an intention to do so, if sufficiently manifested, will be acted upon, subject to this, that a prescribed deviation will not be construed as interfering with the regular order more than is necessary to give effect to the deviation. In the result, the question really becomes one of the proper construction of the deed, to ascertain which all parts of the instrument may rightly be taken into account: see *D'Amico* v. *Trigona* (1); *Strickland* v. *Marchese Felicissimo Apap.* (2)

And as a matter of construction it seems to their Lordships impossible to include as beneficiaries in this first vocation any females at all, if only because those included in that vocation are confined to "male descendants." Moreover, if females are, as under a regular primogeniture, to be called it would appear that on the death in 1892 of the Baron Dr. Giuseppe without issue his sister, Orade, who survived him was the person in the regular order to succeed instead of either the Noble Salvatore or the Noble Rosario, sons of a deceased younger sister. And it is noticeable that in seeking to establish under the deed the respondent's claim to present possession no attempt has been made to extinguish the prior claim of Orade either as at that or any later date. Their Lordships, however, do not labour this point. They base their conclusion here on broader grounds. It seems to them that it is only by a complete disregard of unambiguous words which, with all respect to the learned judge of the First Hall, is not permissible to a Court of construction, that

(1) 13 App. Cas. 814. (2) 8 App. Cas. 106.

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females can as beneficiaries be brought within the first vocation of this primogeniture.

And probably, for that reason, a somewhat different view of this vocation was, as it seemed to their Lordships, presented to the Board by learned counsel for the respondent. That view appeared to be that under this vocation males descended through females, although not females themselves, were called. To take the present case, the Noble Rosario, and the Noble Salvatore descended from Angela, excluded both Angela and Orade, and were called as " male descendants in the male line."

The first observation to be made on this contention is that such a devolution ceases in any sense to be regular, and the respondent by adopting it discards at once the support derived from the references to a regular primogeniture without which the view adopted by the learned judge of the First Hall could hardly even be stated. The devolution now contended for is as irregular as is an agnatic line of descent. If therefore it is to obtain it can only be on the ground that it embodies as matter of construction the true meaning of the words " his male descendants in the male line."

But these words have, by Maltese law, as their Lordships are satisfied, another and a different meaning. No female, even as a channel of descent, has part or lot in a devolution so defined. Indeed, a female may possibly be excluded with equal completeness by the use of the expression " male descendants " alone. " But this," says Joannis Torre, Variarum Juris Quaestionum (1705), tom. 1, p. 419, " fortius procedit in nostra hypothesi quia in eodem periodo in quo fit mentio descendentium masculorum exprimitur per lineam masculinam." And the effect of the full phrase, as found here, is very clearly laid down in two of the authorities referred to by the Court of Appeal : " Si testator vocavit masculos per lineam masculinam descendentes, masculi ex femina non venirent, etc." (Fusarius de Fidei. Substitutione Qu : 346, n. 32), and " Masculi ex feminis in primogenituris et fideicommissis non veniunt quoties testator vocavit lineam masculinam vel masculum descendentem ex masculo, ratio

est quia linea masculina non incipit a femina, quae finis est lineae masculinae." (Bichio, Decis. 493.) In their Lordships' opinion, therefore, the view of this first vocation taken by the Court of Appeal both in their judgment in 1910 in the suit already referred to and again in the judgment now under consideration is well founded. The words used are too clear to be doubtful. In this first vocation the founders mean to call only males descended from males.

Nor have their Lordships any difficulty in harmonizing this view with the references made in cl. 5 to a regular primogeniture. The following passage from the judgment of the Court of Appeal expresses exactly their Lordships' opinion upon this aspect of the matter: "The said authorities bear out what has been said by this Court in the quoted judgment of June 27, 1910, namely, that in the present case the expression masculine line in conjunction with the word 'male' leaves no doubt that the founders meant to call only males from males in the first vocation, notwithstanding the expression 'regular primogeniture' which, in the face of the clear will of the founders, must be taken in the sense given to it in the judgment of 1910 to wit, 'that in the succession of the male lines one must observe the rule of a regular primogeniture with preference to the line, the degree and age, and not that males descended through females and much less females themselves should be held as included in the disposition.'"

There was, however, one objection urged against this construction of the first vocation with which it is desirable to deal. This construction would, it was said, in the result deprive of all benefit under the deed any females and their descendants—the respondent himself may be taken as an example—proceeding in the second and later generations from the sons of the Donna Anna's sons. And this, although in cl. 5, as above quoted, "all her descendants" are to be called, and although it is in effect only on failure of these descendants that the primogenitura is to enter into the family of de Ollivier Viani. Their Lordships agree that this criticism if it were well founded would be serious. But if the extended construction placed by the Court of Appeal in 1910 on the

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words " female children " in cl. 6 of the deed be correct, as their Lordships think it is, this result would not happen. So much cannot, however, be said of the construction for which the respondent contends. Because unless, as for reasons above given is hardly possible, he can include females as beneficiaries in the first vocation, it seems to follow on his view that so soon as any females are there passed over in favour of male descendants they never again find a place for themselves within the vocations. Yet they are all of them " descendants " of the Donna Anna.

There are other considerations leading to the conclusion at which on this issue their Lordships have arrived. Some of them are referred to by the Court of Appeal. But their Lordships do not deem it necessary further to elaborate their judgment on this point. They would only observe that their conclusion that an agnatic line of quality is in fact prescribed by cl. 5 of the deed appears to them to be in complete harmony with the scheme of the instrument taken as a whole. The deed discloses throughout an anxious desire on the part of the founders to prescribe an agnatic devolution of the property as closely as circumstances would permit, one of which was that the male representatives of the Viani family in the generation succeeding their own were all in the female line. In their Lordships' judgment the respondent has shown in himself no title under the deed to the present enjoyment of the primogenial property or any part of it. A true representative of the agnatic line of Filippo is in the vocations in clear priority to him. Is, then, the appellant such a representative ? That question is involved in the second of the respondent's contentions, which their Lordships now proceed to consider.

At this point the appellant is confronted with the difficulty created by cl. 13 of the deed of foundation which, subject to provisions which follow, excludes from the primogenitura : " All those who perhaps were not born of a true and lawful marriage contracted according to the rites of Holy Church, even if they be legitimated by subsequent marriage or by privilege." Lorenzo, the appellant's great-grandfather, was,

as has been seen, such a person. Lorenzo, says the respondent, was excluded from the vocation and his exclusion carries with it that of all persons—and the appellant is one of them —who can come within the vocation only through him.

To this difficulty the answer upon which, it appears, the appellant mainly relied in both Courts in Malta, was that he himself was born of a true and lawful marriage : the exception has no application to any such person as he. In their Lordships' judgment this is not a valid answer. They agree with the Court of Appeal in thinking that the appellant, although himself born legitimate, cannot in this matter be in any stronger position than Lorenzo, from whom he descends.

It is true that while the exclusion of legitimated persons from a primogenitura is permitted to founders, if they desire to make it, nevertheless, such an exclusion is not favoured by the law and its term will be construed strictly : " Hi namque (legitimati per subsequens matrimonium) speciali nota digni sunt, et eorum exclusio debet esse expressa, concludens et certa, ita ut verba fideicommittentis nominatim eorum exclusionem praeseferant." (Joseph Urceolus, Consultationes Forenses, tom. 1, pars 2, c. 57 (1701), p. 45.)

It is true also, that authority can be found for the proposition that such an exclusion applies only to the legitimated persons themselves and does not extend to their descendants, if they, in other respects, are entitled. But there is preponderant authority the other way—authority, the Court of Appeal say, supported by the general opinion of text writers, and authority, which their Lordships agree with that Court in thinking, is according to reason. That view is supported too, in the case of this deed, by a reference to cl. 18, which shows that the founders know how to protect the descendants of an excluded person when it is their desire or intention to do so. In these circumstances their Lordships on this point will content themselves by selecting from the numerous authorities which have been called to their attention the following comprehensive statement of Censalius, " Observationes cum additionibus ad Tractatum de fideicommissis Marci Antonii Peregrini "—ad articulum 24, p. 93, where

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he paraphrases a passage from Fusarius thus: "omnes Doctores cumulat: secundum quos resolvit quod nec filii legitimi et naturales ipsius legitimati admittendi sint ad exclusionem substituti, tamquam nati ex radice infecta, et redarguit contrarium sentientes."

The appellant's first answer to this objection accordingly does not avail him. If Lorenzo was excluded from the vocation so is he. But the appellant has another answer which the Board accepts. In their Lordships' judgment Lorenzo was not so excluded. He comes under both of the exceptions contained in the deed. These exceptions must according to the rule already stated receive a generous construction, and, so regarding the first of them, their Lordships agree with the Court of Appeal in taking its effect to be that a descendant of the Donn' Anna legitimated per subsequens is only excluded in favour of a brother born of a true and lawful marriage, and Lorenzo never had such a brother. But they think further that Lorenzo came within the exception of cl. 14. He was the last male of his primogenial line—the agnatic line of Filippo. As Filippo was the youngest son of the Donn' Anna, the succession, failing Lorenzo, went to or through "a female born of a lawful marriage." As against such a person—and on the principle just discussed, a male descended from such a female is in no stronger position than the female herself—Lorenzo was by cl. 14 entitled to enjoy "without question" the present "primogenitura," and his privilege extends to his agnatic line. On these grounds their Lordships are of opinion that the appellant is, under the deed, the true representative of the male line of Filippo, and that the second contention of the respondent is not well founded.

This brings them to the third and last of the respondent's answers to this suit. He is in possession, and he says that the claim of the appellant as against him is barred by the right to the primogenial property of the Noble Lorenzo Antonio, which on the appellant's view of the deed of foundation is necessarily prior to his own. In other words, the respondent as against the appellant sets up an exceptio

juris tertii, and the question is whether he is entitled so to do.

Now, with reference to this matter, as it is undoubted that the right of a third party can only be set up by a defendant "quando exceptio est ipso jure exclusiva juris agentis," it becomes important at once to determine what the position of the Noble Lorenzo Antonio in relation to this property has been since 1892. He has made no claim to it: he has accepted in relation to it neither privileges nor burdens. On the contrary, he has been in continuous possession of the Testaferrata primogenitura—a possession competent to him, only on the footing that this Viani primogenitura is not united with it in himself. Is his position in relation to the Viani primogenial property nevertheless this, that "nolens volens" it has vested in him so that his title to it, his "jus," is "ipso jure exclusivum juris" of the appellant, or is it that while under the instrument of foundation he may accept the property with its primogenial obligations as well as its rights, he is entitled also, if he be so minded, to ignore it?

In their Lordships' view he is so entitled. The primogenitura is a development of the fideicommissum: each successive person called is called to a trust created by the founder. Must he not accept that trust by claim or entry before his interest, whatever it may be called, vests in himself? De Valentibus (De Ultimis Voluntatibus, (1744), tom. 2, pars 1, votum 28, p. 307) expressly answers this question in the affirmative with direct reference to the matter now under discussion. He there says that a jus tertii does not exclude a plaintiff's claim "quando tale jus pendet a voluntate tertii, qualia sunt jura fideicommissaria, quae ad aliquem non spectant, nisi illo volente, hoc enim casu, jus, quod non, nisi ipso tertio volente, est exclusivum juris agenti, illo non opponente, opponi nequit."

Again, in his De Fideicommissis (1599) art. 41, p. 576 (13th ed. 1725) Peregrinus cites with approval Acharanus: "ubi distinguit, quaedam esse jura, nobis facto, et re ipsa quaesita et adversus haec mala fides impedit praescriptionem; quaedam vero jura esse quae demum nobis competunt, facta

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declaratione, ut in casu jure emphyteutico et in fideicommissis et legatis quae effectualiter non acquiruntur, nisi praevia animi declaratione, et volentibus legatariis et fideicommissariis."

So, again, Joannis Torre, Variarum Juris Quaestionum (1705), tom. 1, tit. 2, p. 465, after observing that before this exceptio can be set up by a defendant the right of the third party should ipso jure exclude the plaintiff's right whether the third party wishes it or not, proceeds: "Et tale non potest esse jus fideicommissarii, cum requiratur eum velle succedere, et in puncto, quod propterea possessor non valeat excipere de jure fideicommissi tertio competente."

And the following authorities show who is to succeed, if the person entitled in priority makes no claim:—

Joannis Torre, Variarum Juris Quaestionum, tom. 2, tit. 6, qu. 6, says: ". . . . si filius Liberti haereditatem repudiaverit, Patronus admittitur, quamuis alias excludatur a filio Liberti. Et plenissime quod qui non potest succedere habeatur pro non extante, adeo ut sit locus aliis successive vocatis."

Again, Cardinal de Luca, tom. 2 (ad lib. 10), decisio 107, observes: "In primogenituris sequens in gradu admittitur ex propria persona si praecedens non successerit, dummodo aliquo tempore saltem in potentia fuerit habilis."

So Rota Romana Decisio 458, December 3, 1640, pars 9, tom. 2, p. 273: "Unde cum defecisset linea descendentium Emilii, nec adessent filii, ant nepotes agnatorum ad cujus negativae probationem satis erat, quod nemo compararet, qui diceret se esse in hoc gradu testatori conjunctum, admitti debebat Angelus ad illius successionem, cum in eo concurreret qualitas cognationis requisita a testatore."

Ibid: decisio 255, February 29, 1643, pars 9, tom. 1, p. 512: "si quidem, in substitutionibus fidecommissariis successivis, deficiente primo vel antecedenti vocato sequens subintrat non dependenter ab antecedenti, sed tamquam ex propria persona succedens, perinde ac si expresse vocatus fuisset in locum antecedentis."

The cumulative effect of these authorities cannot be gainsaid. Neither their relevance nor their weight was in any

way challenged by learned counsel for the respondent, nor were they met by the citation of any authority to the contrary. Unfortunately none of them were brought to the attention of the Court of Appeal, although they displace to a large extent by anticipation the grounds upon which the decision of that Court in favour of the respondent was rested. Stated broadly, the view of the learned judges there was that this suit to recover possession of primogenial property is in its essence an actio rei vindicatoria, in which the plaintiff if he is to succeed at all must have in himself the "dominium" of the property which he alleges is unjustly detained by the defendant. If that "dominium" is vested in some one else, the plaintiff cannot maintain the suit. Here the "dominium" is outstanding in the Noble Lorenzo Antonio. His "jus" is "exclusivum juris agentis." The exceptio juris tertii accordingly applies.

Now the analogy here relied upon between these proceedings and an actio rei vindicatoria rests, it will be seen, on at least two assumptions. The first is that the interest of a person called to the enjoyment of primogenial property can properly be described as "dominium." The second is that that interest vests in each successive holder ipso jure. As to the first of these their Lordships are not prepared to accept it without devoting to the subject much greater consideration than it has received in these proceedings. An onerous trust coupled with an interest would certainly describe more aptly than the term "dominium" the nature of each successive holder's interest in primogenial property. But that question may be reserved for consideration on some other occasion, because it appears to the Board that the second assumption of the Court of Appeal—namely, that the existing primogenial interest—describe it how you will—remains outstanding in the Noble Lorenzo Antonio is entirely displaced by the authorities to which reference has just been made. These authorities however go further. They describe in terms apt for the present purpose the existing position of the appellant in relation to this primogeniture and expound the principle upon which, regardless of the Noble Lorenzo Antonio who

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prefers to stand aside, the claim of the appellant as against the respondent is maintainable. The appellant indeed contended that the Noble Lorenzo Antonio had definitely elected to abandon the Viani primogenitura. Their Lordships cannot so decide in his absence. But his interest in the property in respect of the long period of his refusal to accept its responsibilities is gone. In the result, on this question also, the Board have reached a conclusion favourable to the appellant.

It is a satisfaction to the Board to feel that they are justified by authority in doing so, for that conclusion seems to them to be alone consonant with principle and right. The consequences of the view adopted by both Courts in Malta are indeed devastating. Their decision means that on failure by a beneficiary from whatever interested motive to claim primogenial property that property is at the mercy of any person whether within or without the vocations who succeeds in obtaining possession of it. He may hold it as against all comers—even those next in the vocation—freed and discharged from all primogenial obligations precise and serious as in this case they are. A more complete frustration of founders' intentions as set forth in such an instrument of foundation as that here in question can hardly be conceived.

Accordingly, the orders of both Courts in Malta should, their Lordships think, be discharged except as to costs. The appellant in the opinion of the Board is entitled to the declaration which he seeks, and to an order upon the respondent based upon that declaration to relinquish in his favour all the movable and immovable property constituting the endowment of the primogenitura in question.

As to the appellant's claim to the income accrued or which with the diligence of a prudent man might have accrued from the institution of the proceedings until relinquishment, their Lordships observe that in the earlier suit before the Court of Appeal in 1910 in which the First Hall gave judgment for the plaintiff that Court directed that the liquidation of the income should form the subject matter of a separate suit. It would not be right to adopt that course in the present case, owing to the time which has elapsed since these

proceedings were commenced. But this demand is too serious to be disposed of at once. It has not yet been considered in any Court, and the Board think that this claim of the appellant's should be referred back to the Court of Appeal for adjudication by that Court on the footing of the above declaration.

The orders of both Courts in Malta as to costs should, their Lordships think, remain, in each case, undisturbed. The respondent must pay to the appellant his costs of this appeal and cross-appeal.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *William A. Crump & Son.*
Solicitors for respondent: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

TOOHEY'S, LIMITED . . . . . APPELLANTS;

AND

THE VALUER-GENERAL . . . . . RESPONDENT.

J. C.* 1924 Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Revenue—Valuation of Land—"Unimproved value"—Licensed Premises—Valuation of Land (No. 2 of 1916, N. S. W.), s. 6.

The appellants owned and occupied land in New South Wales upon which were buildings licensed under the Liquor Act (No. 42 of 1912, N.S.W.). The site had no special adaptability for the purpose of licensed premises. The "unimproved value" of the land for the purposes of the Land Valuation Act (No. 2 of 1916, N.S.W.) was assessed at an amount arrived at by deducting the value of the buildings, as appropriate to and suitable for licensed premises, from the amount which would have been realized if the whole subject had been sold as licensed premises. By s. 6 of the Act of 1916 the "unimproved value" of land is the sum which it might be expected to realize upon sale assuming that the improvements (if any) had not been made:—

Held, that the assessment was made upon a wrong principle, since the

* *Present:* LORD DUNEDIN, LORD ATKINSON, and LORD WRENBURY.

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value arrived at included the enhanced value due to the fact that the premises were licensed; and that the valuer should be directed to make a valuation of the land itself with such advantages as it possessed as bare land, without any consideration of its value as including licensed premises.

Judgment of the Supreme Court reversed.

APPEAL (No. 86 of 1924) from a judgment of the Supreme Court of New South Wales (March 11, 1924) upon a special case referred to that Court by the Land and Valuation Court under the Land and Valuation Court Act (No. 10 of 1921), s. 17.

The appellants owned land in Sydney upon which was an hotel, where they carried on the business of licensed victuallers, holding for that purpose a publican's licence issued under the Liquor Act No. 42 of 1912 (N. S. W.), as amended by subsequent Acts.

The respondent made the following valuation of the land under the Valuation of Land Act, No. 2 of 1916 (N. S. W.), as of July 1, 1923: Unimproved value 13,260*l.* Improved value 24,100*l.* Assessed annual value 2150*l.*

The appellant lodged an objection against the valuation of the unimproved value on the grounds: (*a*) That it was too high. (*b*) That it exceeded the standard of value prescribed by s. 6 of the Act.

The terms of ss. 5 and 6 of the Act appear from the judgment of the Judicial Committee.

The objection came on for hearing before the Land and Valuation Court (Pike J.), and the following admissions were made by the parties:—

(*a*) That if the land and buildings had been offered for sale as licensed premises on the relevant date, and on such reasonable terms and conditions as a bona fide seller would require, they might have been expected to realize the sum of 24,100*l.*

(*b*) That if the land and buildings had been offered for sale, but not as licensed premises, on the relevant date, and on such reasonable terms and conditions as a bona fide seller would require, they might have been expected to realize the sum of 13,560*l.*

(*c*) Of the said sum of 24,100*l.* the value of the buildings would have been 10,840*l.* and of the said sum of 13,560*l.* the value of the buildings would have been 6000*l.*

(*d*) That of the amount expected to be realized under either (*a*) or (*b*) no part thereof would be due in either case to anything in the nature of personal goodwill.

(*e*) That the difference—namely, 10,540*l.*—between the amounts expected to be realized under (*a*) and (*b*) was due entirely to the fact that in the one case the premises were licensed and in the other case were not.

(*f*) That the subject land possesses no special advantages or adaptabilities as a site for licensed premises by reason of its position, or otherwise, which render it more valuable than any similarly situated land in the immediate neighbourhood.

The learned judge, having dismissed the objection on December 12, 1923, and determined the unimproved value of the land as 13,260*l.*, stated a case under s. 17 of the Land and Valuation Court Act, 1921, for the opinion of the Supreme Court.

The case as stated raised two questions, but upon its coming before the Supreme Court (Cullen C.J. with Ferguson and James JJ.) the learned judges made an order whereby they declined to answer the questions submitted and substituted the following question: "Whether or not the judge of the Land and Valuation Court was right in his decision that the 'unimproved value' of the land amounted to 24,100*l.* less 10,840*l.*"?

By the judgment of the Court delivered on March 11, 1924, that question was answered in the affirmative, and it was declared that the right method had been followed in determining the unimproved value. The judgment is reported at 24 S. R. (N. S. W.) 154.

1924. Nov. 27. *Maugham K.C.* and *Stamp* for the appellants. The valuation was wrong in principle. It took into account the licence, which was attached to the buildings and not to the land itself. The grant and renewal of the licence

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was not due to any special adaptability or quality of the land itself; it was admitted that the land had none. The Supreme Court relied on the decisions in *Commissioners of Land Tax* v. *Nathan* (1) and *Minister for Home and Territories* v. *Lazarus*. (2) Those cases were decided under different Acts and are distinguishable; so far as the latter case purports to hold that the value of a licence forms part of the unimproved value of the land it was wrongly decided. The appellants rely upon *In re Joseph* (3); the definition of unimproved land applicable in that case was substantially the same as that in the present case. [Reference was made also to *Toohey's, Ld.* v. *The Valuer-General*. (4)]

Clauson K.C. and *Hon. Geoffrey Lawrence* for the respondent. The method of valuation adopted was correct. The buildings were the only improvements on the land. The evidence shows that more will be given for a site which has been used for licensed premises; the existence of the licence is an element to be considered: *Earl Fitzwilliam* v. *Inland Revenue Commissioners*. (5) Under s. 6 of the Act the valuer has to consider the value at the time at which he makes the valuation.

Dec. 22. The judgment of their Lordships was delivered by

LORD DUNEDIN. Their Lordships are of opinion that the valuation in this case made by the valuer-general and confirmed by the judge of the Land and Valuation Court and the Supreme Court of New South Wales cannot stand. They consider that the valuation as made proceeds on a principle which is fallacious, but really stands condemned not so much on this fallacy as upon the fact that it is made not according to the method prescribed by the Act of Parliament.

The question is as to the unimproved value of a piece of ground on which stand buildings occupied as licensed premises. The method of valuation adopted was as follows: First, an agreed figure of 24,100*l.* was taken as the figure that would be realized if the whole subject was sold as licensed premises. Secondly, an agreed figure of 10,840*l.* was put as the value

(1) (1913) 16 C. L. R. 654.
(2) (1919) 26 C. L. R. 159.
(3) (1905) 25 N. Z. L. R. 225.
(4) (1921) 5 Local Govt. Rep. (N. S. W.) 129.
(5) [1914] A. C. 753.

of the buildings on the subject, the buildings being appropriate to and suitable for the purposes of licensed premises. The valuation put on the subject as unimproved value was then reached by deducting 10,840*l.* from 24,100*l.*—i.e., 13,260*l.*

Now, the sections of the Act of Parliament dealing with the matter are as follows :—

Sect. 5 : " The improved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require."

Sect. 6 : " The unimproved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title, had not been made."

It is with the latter of the two sections that the valuer has to do. Now, what he has to consider is what the land would fetch as at the date of the valuation if the improvements made had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken, not only as non-existent, but as if they never had existed. It is, therefore, to approach the question from a completely wrong point of view to begin with a valuation which takes in the improvements and then proceed by means of subtraction of a sum arrived at by an independent valuation in order to find the required figure. What the Act requires is really quite simple. Here is a plot of land ; assume that there is nothing on it in the way of improvement ; what would it fetch in the market ? It will be observed that the value is not what has been sometimes designated by the expression " prairie value." The land must be taken as it exists at the date of the valuation.

It has again and again been pointed out what the value of land on compulsory acquisition is, and the principle here is exactly the same. The value has been formulated by this

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Board in the cases of *Cedars Rapids Co.* v. *Lacoste* (1) and *Fraser* v. *Fraserville City*. (2) Citing the former case the value to the owner consists of all advantages which the land possesses, present or prospective. In the stated case there is a finding of a negative character: (*f*) That the subject land possesses no special advantages or adaptabilities as a site for licensed premises by reason of its position or otherwise which render it more valuable than any similarly situated land in the immediate neighbourhood. But that negative finding, which declares that the land is not better as a site for licensed premises than any other land similarly situated, does not exclude a value which may adhere to the land in respect of its suitability.

Their Lordships do not attempt themselves to make a valuation to be deduced from the figures given, for the simple reason that the valuer has not applied himself to the only questions presented to him by the Act, and it is his business to do so. But, as already said, the result obtained is not only contrary to the method permitted by the Act, but is demonstrably fallacious. Proceedings are begun by the taking of a figure for the subject as it stands as licensed premises. It is obvious that this figure is composed of three ingredients; first, the bare land itself; second, the buildings themselves constructed for and appropriate for licensed premises; third, the enhanced value due to the fact that the land and buildings in question are not only suitable for licensed premises, but are in fact licensed premises.

When, however, the subtraction sum is entered upon it is only item 2 that is subtracted from the total figure; the result being that item 3 is all included in the unimproved value. From this follows the extraordinary result that the land is enhanced by the value of a licence which could only be granted in connection with buildings—for a licence such as this cannot be granted to sell liquor without premises—in a calculation in which you are told to assume that no building is there.

Their Lordships will, therefore, humbly advise His Majesty

(1) [1914] A. C. 569. (2) [1917] A. C. 187.

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that the appeal should be allowed and the case remitted to the Supreme Court to direct the valuer to make a valuation of the land itself as it at present stands with such advantages as it at present possesses, and viewed as bare land without any buildings upon it, and without any consideration of the value of the subject as including de facto licensed premises. The respondent will pay the costs before this Board and in the Courts below.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Light & Fulton.*

[HOUSE OF LORDS.]

H. L. (E.)* 1924 Dec. 5.

ROSE AND FRANK COMPANY . . APPELLANTS;

AND

J. R. CROMPTON AND BROTHERS, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

ET E CONTRA.

Contract—Animus contrahendi—Agreement binding in Honour—Ousting the Jurisdiction—Repugnancy.

By successive arrangements made before 1913 between an American firm and an English company the American firm were constituted sole agents for the sale in the United States and Canada of tissues for carbonising paper supplied by the English company. The greater part of these tissues was manufactured for this English company by another English company. By an arrangement made between the American firm and both English companies in 1913 the English companies expressed their willingness that the existing arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years and so on for further periods of three years, subject to six months' notice. This document, after setting out the understanding between the parties, including several modifications of the previous arrangements, proceeded as follows: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either

* *Present:* EARL OF BIRKENHEAD, LORD ATKINSON, LORD SUMNER, LORD BUCKMASTER, and LORD PHILLIMORE.

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of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is hereinafter referred to as the 'honourable pledge' clause."

Disputes having arisen between the parties, the English companies determined this arrangement without notice. Before the relations between the parties were broken off the American firm had given and the first mentioned English company had accepted certain orders for goods. In an action by the American firm for breach of contract and for non-delivery of goods:—

Held (1.) That the arrangement of 1913 was not a legally binding contract. (2.) That at the date of the arrangement of 1913 all previous agreements were determined by mutual consent, but (3.) That the orders given and accepted constituted enforceable contracts of sale.

Order of the Court of Appeal [1923] 2 K. B. 261 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Bailhache J.

The appellants carried on business in New York as dealers in tissues for carbonising papers.

The respondents, J. R. Crompton and Brothers, Ld. (hereinafter called "Cromptons"), and the respondents, Brittains, Ld., were English manufacturers of tissues for carbonising papers, but the last named respondents manufactured exclusively for Cromptons.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Lord Phillimore.

The appellants sued both the respondents for damages for breach of contract and for damages for non-delivery of goods. By their statement of claim they alleged a series of agreements made between 1907 and 1911 between them and the respondents, Cromptons, whereby the appellants were to have the sole sale in certain areas of certain kinds of tissues manufactured or sold by these respondents. They also alleged an agreement of July, 1913, between the appellants and both the respondents, under which both the respondents agreed to confine the sale of their tissues in certain areas

(1) [1923] 2 K. B. 261.

exclusively to the appellants. This agreement contained the honourable pledge clause set out in the headnote. They also alleged breaches of this agreement in 1918 and 1919, and that in May, 1919, the respondents had wrongfully repudiated this agreement. Alternatively, they alleged that, if the 1913 agreement was not valid, the earlier agreements with the respondents Cromptons were still in force in 1919, and that the breaches alleged were breaches by these respondents of those agreements. They also alleged that in January, February and March, 1919, they had given and the respondents Cromptons had accepted a series of orders for tissues, and that these respondents had failed to deliver part of the goods so ordered.

The respondents by their defence denied that the 1913 arrangement was a legally binding contract or that the previous agreements continued in force after the 1913 arrangement, or that the alleged orders and acceptances constituted legally binding contracts, and pleaded that by virtue of, or, alternatively, at the date of, the 1913 agreement all the previous agreements were determined by mutual consent, and that the appellants were estopped from relying upon them.

Bailhache J. held that the 1913 arrangement was a legally binding contract, and he further expressed the view that the orders and acceptances also constituted legally binding contracts, and so declared in his judgment.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) were unanimous in holding that the 1913 arrangement was not legally binding, and they also held by a majority (Atkin L.J. dissenting) that the orders and acceptances did not constitute legally binding contracts. The Court declined to decide whether the pre-existing agreements continued in force after the 1913 arrangement, and thought that this matter should be left to be determined by the Court of first instance. There was a cross appeal on this point by the respondents Cromptons, who asked that it might be declared that the pre-existing agreements had ceased to be binding on the parties after the arrangement of 1913.

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1924. June 23, 24, 26. *R. A. Wright K.C.* and *C. J. Conway* for the appellants. The agreement of 1913 was introduced after several temporary contracts to stabilize the position of the appellants and, apart from the final clause, it is a legally binding contract. The honour clause, if construed as depriving the document of any legal force, is inconsistent with the document as a whole, and must be rejected on the ground of repugnancy: Sheppard's Touchstone, 8th ed., vol. ii., c. 21, s. 4, p. 373; *Forbes* v. *Git* (1); *Furnivall* v. *Coombes* (2); *Williams* v. *Hathaway*. (3) *Balfour* v. *Balfour* (4) is distinguishable, because that was a case of a family arrangement and the parties were not at arm's length. When once there is found to be a bargain between the parties, that cannot be nullified by words such as those used in the concluding clause of this agreement. Further, that clause is an attempt to oust the jurisdiction of the Court, and is therefore void: *Scott* v. *Avery* (5); *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (6); *Czarnikow* v. *Roth, Schmidt & Co.* (7) On the question whether, on the assumption that the main contract is bad, the pre-existing contracts were determined, the Court of Appeal took the view that this was a separate issue and declined to express any opinion upon, it because it had not been discussed in the Court of first instance, and the appellants accept that view. The point not having been dealt with in either of the Courts below, this House will not treat it as open. As to the orders, they are not the less enforceable contracts of sale because the exclusive agency agreement is not legally enforceable.

Sir John Simon K.C. and *Clauson K.C.* (with them *Eastham K.C.* and *James Wylie*) for the respondents and the appellants on the cross appeal.

[EARL OF BIRKENHEAD. Their Lordships do not desire to hear you on the main point.]

Assuming that the respondents are right on the main point, the question arises whether the earlier arrangements survive.

(1) [1922] 1 A. C. 256, 259.
(2) (1843) 5 Man. & G. 736.
(3) (1877) 6 Ch. D. 544.
(4) [1919] 2 K. B. 571.
(5) (1856) 5 H. L. C. 811.
(6) [1922] 2 A. C. 250.
(7) [1922] 2 K. B. 478, 485.

If the arrangement of 1913 is meant by all the parties thereto to be binding in honour only it is inconceivable that the old arrangements should be held to survive. The arrangement of 1913 being by its express terms unenforceable, it would be absurd to go back to the old arrangements. The inevitable inference from the document of 1913 is that when the parties put their business arrangements on a basis of honour they contemplated putting an end to the old agreements. This was a new arrangement with new parties and new terms, and it has been acted on for several years. [They cited *British and Beningtons* v. *North Western Cachar Tea Co.* (1); *Morris* v. *Baron & Co.* (2); *Pearl Mill Co.* v. *Ivy Tannery Co.* (3)] This point could only be decided in one way, and the Court of Appeal ought to have decided it. There was no occasion for any further trial. As to the orders, no legal obligation arose at any time before the goods were shipped. There was no intention on the part of Cromptons to accept a legal obligation in regard to delivery. Assume that the honour agreement had been a legally binding agreement, its terms could have been embodied in the contract resulting from the giving and acceptance of an order. So, this being an honour agreement, its terms are still incorporated, but they have no binding effect.

C. J. Conway in reply on the main appeal and for the respondents on the cross appeal. The question whether the agreement of 1913 abrogated the earlier agreements was not open to the Court of Appeal, as the point had not been taken in the Court below. Assuming that the point is now open, an honourable understanding cannot have effect as an agreement that the old agreements should not survive. *Morris* v. *Baron & Co.* (2) is distinguishable, because there there was a contract, although it could not be enforced, because it was not in writing as required by the Statutes of Frauds. This document is simply a scrap of paper.

The House took time for consideration.

(1) [1923] A. C. 48, 67. (2) [1918] A. C. 1, 13.
(3) [1919] 1 K. B. 78.

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1924. Dec. 5. LORD BUCKMASTER. My Lords, I had prepared an independent opinion in this case, but I have had an opportunity of reading the judgment which will shortly be read by my noble and learned friend, Lord Phillimore, with which I agree, and I think there is no need for any further independent judgment on my part; and my noble and learned friends, Lord Birkenhead and Lord Sumner, also desire that I should express their agreement in the judgment about to be read.

LORD ATKINSON. My Lords, I also have had an opportunity of reading the judgment prepared by my noble and learned friend, and I concur with it.

LORD PHILLIMORE. My Lords, at the conclusion of the arguments in this case none of your Lordships had, I think, any doubt what our judgment ought to be, but as there were several points to be dealt with, your Lordships took time to consider how best to express your decision upon them. We are all still, I believe, of the same mind, and there is no reason for further delay.

The appellants, Rose and Frank Company, carry on business in the United States as dealers in carbonising tissue paper, which they have been in the habit of buying from England, then treating in some manner and selling in the perfected state.

Their relations with the respondents, James R. Crompton and Brothers, Ld., began as early as 1905; and there were three arrangements, which for the purposes of this appeal we may assume to have been binding contracts, under which Rose and Frank Company were to be entitled to have the exclusive or nearly exclusive right of selling Crompton and Brothers' carbonising tissues in America, subject to twelve months' notice—a notice which was never given.

In 1913 circumstances led to the relations between the parties being reconsidered; and it was then for the first time brought to the notice of Rose and Frank Company that the respondents, Brittains, Ld., had been interested with

Cromptons in supplying the carbonising tissue; and thereupon the three parties entered into the arrangement which has given rise to the present litigation. It is dated July 8, 1913, and in the earlier part of it appears to be a binding agreement, under which the English companies agree to confine the sale of all their carbonising tissue in the U.S. and Canada —subject to certain defined exceptions—and Rose and Frank Company agree to confine their purchases of the same stuff exclusively to the two English companies and to do their best to increase their trade. The arrangement was to last for three years subject to six months' notice. The other supplementary provisions need not be stated; but towards the end of the document appears this remarkable clause: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation."

There is no explanation upon the record, and no suggestion was made by counsel at the Bar of any reason for the introduction of this remarkable clause. During the progress of the hearing it occurred to some of your Lordships that it might have been inserted in order to avoid the operation of some American law discouraging monopolies. But this was a mere surmise. For whatever reason it was introduced the clause is there, and it remains for the Courts to give the proper effect to it.

The terms of this arrangement, whatever may be its force or effect, were continued by correspondence for a second three-yearly period and by arrangement in August, 1918, till March 31, 1920.

During the early part of 1919 differences arose between the parties. The respondents thought that the appellants were not conducting the business as they should, and that their

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(the respondents') interests were suffering. Accordingly on May 5 they demanded by telegram compliance with certain requirements, threatening, if the requirements were not met, to communicate direct with the consumers.

On the same day the appellants telegraphed back that they refused to consent to terminate the agreement and would hold the respondents accountable for any violation of contract, and they demanded immediate shipment of the parcels they had ordered; but on May 9 and 10, by cable and letter, the respondents definitely refused to allow further deliveries to be made.

During the existence of the arrangement the appellants had been giving to the respondents, Cromptons, from time to time, orders for certain numbers of cases of tissues to be delivered at various dates. The documents took this form: an order from the appellants to Cromptons: "Please enter our order for the following goods and ship." Then followed either a specific date—usually the first of the month—or, if no specific date, then "as soon as possible," and the port to which they were to be shipped, either New York or sometimes Toronto, and the nature of the articles required. In compliance with these orders the respondents used to ship the goods. A few of the orders sent in this way in the early part of 1919 were complied with, but the others had not actually been complied with by the time of the quarrel and were not fulfilled afterwards.

On November 19, 1919, the appellants brought their action, treating the arrangement as a binding contract and claiming damages for the breach, alternatively averring that the three earlier agreements were still in force and claiming damages for their breach, and as a third alternative relying on the several specific orders for parcels of goods in the early part of 1919 as having been accepted by the respondents, Cromptons, and constituting specific contracts and claiming damages for the non-delivery of these goods. As to this part of their claim, they made no case against the respondents, Brittains, Ld.

The respondents joined in their defence, and contended that the arrangement was not a binding contract, that the earlier

agreements were not binding contracts or had expired by loss of time. They also offered an alternative plea that if the respondents, Cromptons, ever made any of the earlier agreements, then "all of such agreements were determined by mutual consent by virtue of or alternatively at the date of the signing of the document referred to in paragraph 8 of the statement of claim and/or alternatively the plaintiffs by signing the said document and acting thereon are estopped from relying on any of the said alleged agreements."

As to the appellants' claim in respect of the specific orders, they denied that these orders gave rise to any contracts, said that the requirements of s. 4 of the Sale of Goods Act had not been complied with, and further that these orders and acceptances, if any, were given as part of a specification under the arrangement of 1913, and that if that arrangement did not constitute any legal contract, neither did these orders with provisional acceptances constitute contracts.

They further pleaded misconduct on the part of the appellants justifying them in determining the agreement.

By an order made by McCardie J. the action was transferred to the commercial list, and it was ordered that the Court should try all questions of liability "except the issue as to whether the appellants committed certain acts which were alleged by the respondents to have justified the respondents in determining the agreements (if any) between the parties"; and all questions as to damages. The order provided that the Court should construe all the agreements.

These issues were then tried by Bailhache J. He decided that the arrangement of 1913 was a binding contract, and further that if the appellants were ultimately held to fail on this ground, they had a good case as to the orders and acceptances. He then dealt with two comparatively small money questions, directing judgment for the plaintiffs for 244*l.* odd with costs up to the date of the admission of this claim, and for the respondents, Cromptons, for 2124*l.* odd with costs up to the date of admission; and he gave the appellants the costs of the hearing before him in any event.

The present respondents appealed from this order, and the

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Court of Appeal came unanimously to a different conclusion to that of Bailhache J. with respect to the arrangement of 1913, and by a majority (Bankes and Scrutton L.JJ.; Atkin L.J. dissenting) thought that Bailhache J. was also wrong on the question of orders and acceptances. They declined, however, to determine whether the pre-1913 arrangements were still in existence, and whether if in existence they were enforceable, and said that this matter remained to be tried. They gave the respondents costs of the issues on which they were successful and the costs of the appeal. Appeal and cross appeal have been preferred from this order and are now before your Lordships for decision.

With regard to the first and most important point, that of the legal force or want of force of the arrangement of 1913, your Lordships are, I conceive, of one mind with the Court of Appeal. I do not propose to repeat their reasoning, with which I venture to concur, but I wish to add one observation. I was for a time impressed by the suggestion that as complete legal rights had been created by the earlier part of the document in question, any subsequent clause nullifying those rights ought to be regarded as repugnant and ought to be rejected. This is what happens for instance in cases where an instrument inter vivos purports to pass the whole property in something either real or personal, and there follows a provision purporting to forbid the new owner from exercising the ordinary rights of ownership. In such cases this restriction is disregarded. But I think the right answer was made by Scrutton L.J. It is true that when the tribunal has before it for construction an instrument which unquestionably creates a legal interest, and the dispute is only as to the quality and extent of that interest, then later repugnant clauses in the instrument cutting down that interest which the earlier part of it has given are to be rejected, but this doctrine does not apply when the question is whether it is intended to create any legal interest at all. Here, I think, the overriding clause in the document is that which provides that it is to be a contract of honour only and unenforceable at law.

With regard to the next point—namely, the right of the

plaintiffs to recover damages for non-delivery of the goods specified in the particular orders for the year 1919—it should be stated that the defence under the Sale of Goods Act was abandoned at the trial. On this point I agree with your Lordships in preferring the judgments of Bailhache J. and Atkin L.J. to that of the majority of the Court of Appeal.

According to the course of business between the parties which is narrated in the unenforceable agreement, goods were ordered from time to time, shipped, received, and paid for, under an established system; but the agreement being unenforceable, there was no obligation on the American company to order goods or upon the English companies to accept an order. Any actual transaction between the parties, however, gave rise to the ordinary legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction.

Goods were ordered, shipped, and received. Was there no legal liability to pay for them? One stage further back. Goods were ordered, shipped, and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American company would be bound. If the goods were short-shipped or inferior in quality, or if the nature of them was such as to be deleterious to other cargo on board or illegal for the American company to bring into their country, the American company would have its usual legal remedies against the English companies or one of them. Business usually begins in some mutual understanding without a previous bargain.

However, as to this claim for damages for the unfulfilled orders, the respondents have, under the terms of the order of McCardie J. the defence open to them that the conduct of the appellants was such as to justify them in determining the agreements to deliver.

There remains the matter of the cross appeal. This, I think, succeeds.

The unenforceable agreement cannot (it is true) be relied

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upon as cancelling the previous agreements, because it was to have no legal weight. But the parties who entered into the relations implied by the unenforceable agreement must have previously cancelled, as they could do by mutual consent, all the earlier agreements.

Upon the documents which were before the Court—which were indeed the only materials before the Court—the proper inference to be drawn was that the arrangement of 1913 was, though unenforceable, intended to supersede all previous arrangements or agreements, whether enforceable or unenforceable.

The principle laid down in *Morris* v. *Baron & Co.* (1), followed in *British and Beningtons* v. *North Western Cachar Tea Co.* (2), is the one which governs the present case.

It was a pity, I think, that the Court of Appeal determined, apparently against the view of Scrutton L.J., to remit this issue for trial instead of deciding it themselves. I think they should have decided it, and decided it in favour of the respondents and cross appellants.

Upon the whole, I would advise your Lordships to restore the judgment of Bailhache J., except that part of it which declares "that the agreement of July, 1913, mentioned in paragraph 8 of the statement of claim is a legally binding agreement against both defendants," and which directs that the plaintiffs should have the costs of the hearing before him as against the defendants Brittains, Ld., and I would advise that the plaintiffs (the present appellants) should have the costs of the appeal to the Court of Appeal as against the respondents and defendants, Cromptons. I presume that the respondents and defendants, Brittains, Ld., had no separate costs on that appeal. With regard to the costs of the appeal to your Lordships' House, the appellants have succeeded in what may prove a very substantial part of their case, but on the other hand the result of the issue still to be tried may wipe out their claim. The respondents, Brittains, Ld., have been successful, but I imagine that before your Lordships' House, as in the Court of Appeal, they had no

(1) [1918] A. C. 1. (2) [1923] A. C. 48.

separate costs. I think that the right order would be that neither side should have any costs of the appeal, but that the cross appellants should have the costs of their cross appeal. Any costs of the action not disposed of by these orders should be disposed of by the judge who tries the remaining issue.

The case should be remitted to the High Court of Justice with a declaration that it be disposed of accordingly.

Order of the Court of Appeal reversed, and judgment of Bailhache J. restored, except so far as it declares that the agreement of July, 1913, *is a legally binding agreement, and except so far as it directs that the plaintiffs should have the costs of the hearing as against the defendants, Brittains, Ld. The respondents in the original appeal, J. R. Crompton Brothers, Ld., to pay the costs in the Court of Appeal. Each party to bear their own costs respectively in respect of the original appeal to this House. Cross appeal allowed. The respondents in the cross appeal to pay the costs of the said cross appeal. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Dec. 5, 1924.

Solicitors for the appellants (respondents on the cross appeal): *Wild, Collins & Crosse.*

Solicitors for the respondents and the appellants on the cross appeal: *Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 Feb. 19.

FOULSHAM . . . . . APPELLANT;

AND

PICKLES . . . . . RESPONDENT.

Revenue—Income Tax—Income from "possessions" out of United Kingdom—Earnings from Employment abroad—Power to remit Assessment to Commissioners for Amendment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 149, *sub-s.* 2 (*a*); *Sch. D, Case V., r.* 2.

The word "possessions" in Case V. of Sch. D to the Income Tax Act, 1918, includes an employment which is a source of income.

So *held* on the authority of *Colquhoun* v. *Brooks* (1889) 14 App. Cas. 493.

The respondent was employed abroad for nearly the whole of each year under a contract of service with an English company and was paid a salary and commission. The contract provided that the commission should be paid into a banking account in this country, and both the salary and commission were in fact paid in this country. The Special Commissioners of Income Tax assessed him under Sch. D, Case V., of the Income Tax Act, 1918, on his earnings under his contract as in respect of a possession out of the United Kingdom:—

Held, (1.) that, having regard to the mode of payment provided by the contract, the respondent's employment was not wholly out of the United Kingdom, and was therefore not a possession out of the United Kingdom, and that the assessment was wrongly made under Case V.; (2.) that in the circumstances the matter ought not to be remitted to the Commissioners to make an assessment under some other Case.

Decision of the Court of Appeal [1924] 1 K. B. 323 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (2)

The respondent appealed against an assessment to income tax in the sum of 500*l.* for the year ending April 5, 1920. The assessment was made under Sch. D, Case V., of the Income Tax Act, 1918, in respect of the respondent's income arising from possessions out of the United Kingdom—namely, his earnings in respect of his employment in West Africa by an English company now known as the African and Eastern Trade Corporation, Ld., under certain contracts of service.

**Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

(1) [1924] 1 K. B. 323. (2) [1923] 2 K. B. 413.

The Special Commissioners confirmed the assessment and increased the amount.

Rowlatt J. held that in respect of his employment under the said contracts the respondent had not a possession, nor, if he had a possession, was it out of the United Kingdom. He therefore held that the respondent was wrongly assessed under Case V. He also held that in the circumstances the Court had no jurisdiction to amend the assessment or to send it back to the Special Commissioners.

The Court of Appeal (Pollock M.R., Warrington L.J. and Astbury J.) agreed that the assessment was wrongly made under Case V., and they declined to send it back to the Commissioners for amendment.

The facts are fully stated in the report of the case before the Court of Appeal, and sufficiently appear from the opinion of the Lord Chancellor.

1925. Jan. 20, 22, 23. *Sir Thomas Inskip S.-G.* and *Reginald Hills* (*Sir Douglas Hogg A.-G.* with them) for the appellant. The respondent was a person residing in the United Kingdom: *Cooper* v. *Cadwalader* (1); *Thomson* v. *Inland Revenue* (*or Bensted*) (2), and was entitled to profits arising from an employment carried on in West Africa. The respondent's employment was a source of profits within the words in the second limb of Sch. D of the Income Tax Act, 1918, "any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." The respondent's employment being carried on in West Africa was an employment carried on elsewhere than in the United Kingdom and, accordingly, is one of the sources the profits of which are chargeable as income arising from possessions out of the United Kingdom to the extent of the amount remitted to or received in the United Kingdom. *Colquhoun* v. *Brooks* (3) shows that the word "possessions" in Case V. of Sch. D is a word of the widest possible import, and means every source of income which the person chargeable has elsewhere than in the United Kingdom. The actual

(1) (1904) 5 Tax Cas. 101. (2) 1919 S. C. 8; 7 Tax Cas. 137.
(3) 14 App. Cas. 493, 508, 516.

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decision related to profits derived from a trade, but the Schedule includes under one heading profits "from any trade, profession, employment or vocation" and draws no distinction between the several items, and the reasoning of Lord Herschell and Lord Macnaghten applies equally to an employment regarded as a source of income. If then this employment is a possession within the meaning of Sch. D, is it a possession out of the United Kingdom? In the appellant's submission the locality of the employment does not depend upon where the contract is made but upon where the employment is in fact carried on, and this employment was carried on in West Africa. The assessment was therefore rightly made under Case V. of Sch. D. Assuming that Case V. does not apply, then the respondent was chargeable under Case II. on the full amount of profits which he received, whether remitted to the United Kingdom or not, and the matter should be remitted to the Special Commissioners under s. 149, sub-s. 2 (*a*), to amend the assessment so as to bring it in accordance with the right rules of the Schedule. The essential distinction in the Act is between the different Schedules, and an assessment made under a wrong Case of a right Schedule may be amended. There is no case in the books where an assessment fully chargeable has been set aside because it has been made under a wrong Case. [Upon this point they referred to *Edmonds* v. *Eastwood* (1); *Ryhope Coal Co.* v. *Foyer* (2); *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes* (*or Kinmont*) (3); *Malcolm* v. *Lockhart* (4); *Coman* v. *Governors of the Rotunda Hospital, Dublin* (5); *Carlisle and Silloth Golf Club* v. *Smith* (6); *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (7)]

Latter K.C. and *Blanco White* for the respondent were not called on.

The House took time for consideration.

(1) (1858) 2 H. & N. 811.
(2) (1881) 7 Q. B. D. 485, 501.
(3) (1889) 17 R. 154, 163, 166; 2 Tax Cas. 516, 527, 531.
(4) [1919] A. C. 463; 7 Tax Cas. 99.
(5) [1921] 1 A. C. 1, 13, 14; 7 Tax Cas. 517, 579, 580.
(6) [1912] 2 K. B. 177, 190, 191; [1913] 3 K. B. 75, 80, 81, 83; 6 Tax Cas. 48, 58, 198, 199, 201.
(7) [1911] 2 K. B. 577, 591.

1925. Feb. 19. VISCOUNT CAVE L.C. My Lords, the question to be determined on this appeal is whether the respondent was correctly assessed to income tax in respect of the earnings received from his employment in the financial year 1919–20.

During the period of assessment the respondent was employed by the African Association, Ld. (an English company), as a district supervising agent in the colony of Nigeria on the terms contained in two agreements of which the more important was dated May 6, 1919. Under this agreement he was to serve the company for a period of two years, and was to spend nine months of each year in the execution of his duties in Africa, and the remaining six months' interval between the two periods of nine months was to represent time occupied in voyaging to and from Africa and on furlough. The company was to pay the respondent a salary of 500*l.* per annum while in Africa and voyaging, and was also to pay for his board and other recognized expenses. While at home the company was to pay him salary at the rate of 750*l.* per annum upon the fulfilment by him of his obligations. The company also agreed to pay to the respondent a commission on the net profits realized on certain of their factories, the minimum commission being 500*l.* It was provided by the agreement that the respondent should not draw or claim payment in the colony in respect of commission earned by him, but payment in respect thereof was only to be made to him through the office of the company in Liverpool.

Throughout the year of assessment the respondent rented a house at Blackpool, in Lancashire, and was rated as the occupier of the house. His wife and family resided there, but he was not himself in the United Kingdom except for a few days towards the end of the year. The whole of his salary and commission was paid by the company into a banking account in England on which his wife had power to draw.

On these facts the General Commissioners assessed the respondent to income tax in respect of his possessions out of the United Kingdom—namely, his earnings from his

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employment in West Africa. The notice of assessment is not forthcoming, but on the hearing of an appeal to the Special Commissioners it was stated by the representative of the Crown that the tax was charged under Case V. of Sch. D. The Special Commissioners held that the respondent was a person residing in the United Kingdom during the year of assessment, and confirmed the assessment, increasing the amount, subject to a case stated for the opinion of the High Court. On the argument of the case stated, Rowlatt J. discharged the assessment on the ground that the respondent had no possession out of the United Kingdom in respect of which he could be assessed to tax under Case V., and declined to send the matter back to the Commissioners in order that they might make an assessment under Case II. On an appeal to the Court of Appeal, that Court confirmed the order of Rowlatt J., and the revenue authorities have now appealed to this House.

My Lords, the greater part of the arguments on behalf of the Crown was directed to establishing the proposition that an employment could be a "possession" within the meaning of Case V. of Sch. D to the Income Tax Act, 1918; and for myself I assent to that proposition. It was decided by this House in *Colquhoun* v. *Brooks* (1) that a trade carried on wholly in Australia was such a possession, and accordingly that a person resident in the United Kingdom was assessable to tax in respect of so much of his share of the profits of that trade as had been remitted to this country; and it appears to me that the reasoning which led the learned Lords who heard that case to their decision, applies not only to a trade but to each of the other sources of income which in para. 1 (*a*) of Sch. D are coupled with trades, that is to say, to a profession, employment or vocation. In the case cited, Lord Macnaghten stated his conclusion as follows: "The word 'possessions' is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not 'possessions in Ireland' mean everything, every source of income that the person chargeable

(1) 14 App. Cas. 493, 516.

has in Ireland, whatever it may be ? Why should not 'profits from possessions out of Great Britain,' which is to be found in Sch. G, No. XI., and recalls the expression 'income out of Great Britain' in the Act of 1799, mean profits from every source of income abroad ? I use the expression 'source of income,' because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in s. 52, uses the expressions 'sources chargeable under the Act' and 'all the sources contained in the said several schedules' as describing everything in respect of which the tax is imposed." This conclusion appears to me to apply to an employment out of the United Kingdom which (like a trade) is a source of income; and I do not doubt that (to take two simple instances) a doctor residing in England and practising in France only, or a mining engineer having a residence here and wholly employed by a Spanish mining company in Spain, might be held to have a foreign possession and to be assessable under Case V.

But assuming this to be so, it does not follow that the appellant is entitled to succeed in his appeal. For that purpose it is necessary for him to show that the respondent's employment was wholly out of the United Kingdom, and that (to use Lord Macnaghten's expression) the whole source of his income was overseas; and this, in my opinion, he has not shown. I will assume—although I feel some doubt on the point—that the respondent's services to the company were to be rendered in West Africa only, and that he had no duties to his employers while he was in England; but it remains true that the commission, which was the principal remuneration for his services, was, under the terms of his employment, payable in England only, and that he was precluded by the express terms of his agreement from drawing or claiming payment of that commission in the colony. In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom. In these circumstances I do not think it can be

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said that his source of income was wholly outside this country, so as to bring him within Case V.

There is a further difficulty which stands in the appellant's way—namely, that the whole of the respondent's remuneration was in fact paid to him here and not in Nigeria. The second of the rules applicable to Case V. is as follows: "2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed." From this rule it follows that, in order to be taxable under Case V., an income arising from possessions out of the United Kingdom must be received in the United Kingdom either: (*a*) from remittances payable in the United Kingdom; or (*b*) from property imported into the United Kingdom; or (*c*) from money or value arising from property not imported; or (*d*) from money or value received on credit or on account of remittances, property, money or value brought or to be brought into the United Kingdom. The word "remittances" (which recalls the expression "remittances from thence" in the corresponding rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the rule all refer to property, money or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the rule, and so is not taxable under Case V. at all.

In my opinion, therefore, the appeal fails on the main point.

Your Lordships were asked, in the event of your holding

that the respondent was not taxable under Case V., to send the matter back to the Special Commissioners with a view to their now assessing the respondent in respect of the same income under Case II. of Sch. D. My Lords, I am far from saying that the respondent could not have been assessed under that Case, or that the Court has no jurisdiction when Commissioners have proceeded under the wrong Case to remit the matter to them under s. 149, sub-s. 2, of the Income Tax Act with a view to their making a proper assessment; but I do not think that such a course should be taken in the present instance. The revenue authorities have chosen deliberately to assess the respondent under Case V. as on income arising from a possession out of the United Kingdom, and have persisted in that course notwithstanding the respondent's objections. The time for assessing him under Case II. has now expired, and I do not think that it would be right now to require the Commissioners to make an assessment under that Case. In my opinion this appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, however much it may have been open, either in the original assessment or before the Commissioners, to rest the liability on alternative cases under Sch. D, it is distinctly stated in this case that the present demand was based on Case V. alone. It is not therefore, I think, possible for your Lordships to consider whether upon the facts as set forth an assessment might not be based on some other case.

The question for decision is accordingly whether the sum of 2245*l.* received by the respondent in respect of his salary and commission is, to quote the wording of s. 2 of Sch. D of the Income Tax Act, liable to be charged with a tax in respect of income arising from possessions out of the United Kingdom.

Two propositions are here involved: this income must be income from a possession; and the possession must be out of the United Kingdom.

My Lords, I think it is not doubtful that in the ordinary

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use of language one would not be apt to describe a man who gets a salary and commission on sales as enjoying a possession. But I think none the less that the case of *Colquhoun* v. *Brooks* (1) has settled the matter. No doubt what was then being considered was a business or trade. But the Schedule itself groups employment along with trade ; and the arguments which prevailed in *Colquhoun's* case (1) to determine that the business was a possession are equally applicable to an employment.

Upon this point, therefore, I prefer the view of Warrington L.J. to that expressed by the other learned judges of the Court of Appeal. When, however, I come to the second proposition I find myself unable to affirm that this is income arising from a possession out of the United Kingdom. This income comes from the contract of employment made in the United Kingdom. When I say made in the United Kingdom I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit which is the payment which the employers covenanted to make. This was payable and paid in London.

I am fortified in this view by a consideration of the terms of r. 2, Case V., which is the rule which would apply if this were a possession out of the United Kingdom. The tax is to be computed " on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom on an average of the three preceding years, etc." It will be seen at once how entirely inappropriate all these expressions are to the case of the respondent's salary and commission paid as aforesaid. I am therefore of opinion that on the sole question stated and argued as to the respondent's liability the Crown fails.

As to the application to remit the case in order that the

(1) 14 App. Cas. 493.

assessment may be altered to an assessment founded on some other Case I have nothing to add to what has been said by the Lord Chancellor.

LORD ATKINSON. My Lords, I concur in the judgment which has been delivered by my noble and learned friend Lord Dunedin.

LORD SUMNER. My Lords, I have had the advantage of reading and considering the judgment delivered by the Lord Chancellor. I quite agree with it.

LORD BUCKMASTER. My Lords, Mr. James Arthur Pickles, the respondent in this case, has been found to be a person residing in the United Kingdom. He was engaged by the African Association, Ld., to serve them in West Africa as district supervising agent at a salary of 500*l.* and commission, and by the terms of his employment it was provided that he should not draw nor claim payment in the colony in respect of commission, but payment thereof should only be made to him through the office of the company in Liverpool. It is also found as a fact by the Special Commissioners that the whole of his salary was also paid into a banking account in England upon which his wife had the right to draw. He was assessed to income tax in the sum of 500*l.* for the year ending April 5, 1920, the basis of the assessment being under Sch. D, subhead 2, Case V., that is, "in respect of income arising from possessions out of the United Kingdom." The amount of this assessment was increased by the General Commissioners, but amounts are not important for the purposes of this appeal.

The respondent being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Sch. D, subhead 1 (*a*) (ii.), in respect of annual profits or gains arising from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; but, as pointed out, he was in fact assessed under subhead 2, Case V.

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The first question is whether that assessment was rightly made.

Now the case of *Colquhoun* v. *Brooks* (1) has shown that, however inapt the word "possessions" may be in Case V., it must in fact embrace the trade, profession, employment, or vocation mentioned under subhead 1 (*a*) (ii.), and in that particular case it was plain that this House regarded the provision as a modification of the earlier clauses and intended to limit the amount of tax in cases where the income arose from possessions out of the United Kingdom to the amount of income actually received from those possessions: per Lord Macnaghten. (2) The real test that was laid down by Lord Herschell and Lord Macnaghten was that you were to ascertain what was the source of income, and, if the source of income was a trade, profession, employment or vocation carried on outside the United Kingdom, only the amount of income actually received in the United Kingdom would be taxed.

In the present case I do not think that the source of income was the employment of the respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country. This view is emphasized by the fact that the rules themselves provide by r. 2, applicable to Case V., that the tax in respect of income arising from possessions out of the United Kingdom shall be computed on "the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from imported property, or from money or value arising from property not imported," which points to the fact that the money is to be received here from a source abroad. I therefore think the Court of Appeal and Rowlatt J. were right in deciding that the tax could not be properly levied under Case V.

It was then urged that, if this be so, since the respondent was resident here and would consequently be liable under the earlier rule, the matter should be remitted in order that

(1) 14 App. Cas. 493. (2) 14 App. Cas. 514, 515.

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the assessment might be altered in that respect. I am unable to accede to this request. Remission is not a matter of right but of discretion—a discretion to be carefully exercised in each case and dependent upon the special circumstances in which it stands. The Court of Appeal has decided here against remission, and I see no reason to interfere with their action. I desire to add that I am not satisfied that the ground upon which Rowlatt J. based his refusal to remit was well founded.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 19, 1925.

Solicitor for the appellant: *The Solicitor of Inland Revenue.*
Solicitors for the respondent: *Withall & Withall.*

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GLOUCESTER RAILWAY CARRIAGE AND WAGON COMPANY, LIMITED Appellants;

AND

COMMISSIONERS OF INLAND REVENUE Respondents.

Revenue — Corporation Profits Tax — Business of manufacturing Railway Wagons for sale or hire—Discontinuance of hiring Business and sale of Wagons used therein at a Profit — Trade Profit or Capital Accretion — Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *ss.* 52, 53.

A company manufactured railway wagons and dealt with them either by selling them (outright or under hire purchase agreements) or by letting them on hire. In the books of the company the wagons owned by the company and let on hire were capitalized at a sum which included a calculated sum added as profit on manufacture and a certain amount was written off the value year by year for depreciation. The company, having decided to sell all the wagons used for letting on hire, sold them at sums larger than the sums at which the wagons then stood in the books. In assessing the company to corporation profits tax the

* *Present:* Viscount Cave L.C., Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Buckmaster.

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surplus obtained from the sale of these wagons was included as a trade profit of the company, and on appeal the Special Commissioners, in affirming the assessment, found that the business of the company was a single business—namely, to make a profit in one way or another out of manufacturing wagons :—

Held, that the surplus in question was not a capital accretion, but was rightly included as a trade profit for the purposes of the corporation profits tax.

Decision of the Court of Appeal [1924] W. N. 105 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Rowlatt J. upon a case stated by the Special Commissioners for the Special Purposes of the Income Tax Acts.

The question raised by the appeal was whether a sum representing the excess of the purchase price obtained by the appellant company on the sale of certain railway wagons over the figure at which the wagons were then valued in the company's books should be included as a trade profit for the purpose of computing the liability of the company to corporation profits tax or should be treated as a capital accretion not liable to be accounted for in such a computation.

The appellant company, which was a reconstruction of an older company, was incorporated under the Companies Acts in 1888, and the objects of the company were defined by the memorandum of association as (inter alia) to " manufacture, construct, repair, maintain, buy, sell, and let on hire carriages, wagons, vehicles, engines and other rolling stock."

The principal business of the company was the manufacture of railway wagons. Of these wagons some were constructed according to the specifications of intending purchasers and sold either for cash or under hire purchase agreements ; others were let for definite periods under agreements which gave the hirers no right of ultimate acquisition, herein called simple hire agreements. Sometimes also the company bought wagons from other owners and used them for letting under simple hire agreements and sometimes the company used for that purpose wagons originally the subject of hire purchase agreements which customers failed to fulfil. In the books of the company the wagons owned by the company and let on simple hire were capitalized at a sum which included what

was termed a manufacturing profit and certain sums were written off the value of the wagons year by year for depreciation. These sums were allowed as a deduction in computing the profits of the company for income tax purposes in each year. In 1909 the wagons let on simple hire were revalued by the company and a sum of 2131*l.* odd was written off as a capital loss for income tax and all other purposes as the result of the revaluation. The company had always kept separate accounts in respect of the letting out of wagons on simple hire, the profits from which were separately shown.

The profit or loss arising from the company's dealings in wagons of all classes, whether by way of sale outright (including the sale of simple hire wagons, when sold) or on the hire purchase system, or by way of letting on simple hire, was treated by the company in the ordinary course of its business as profit or loss on revenue account both for commercial and for income tax purposes.

After the war the company decided to sell all its simple hire wagons together with the benefit of the tenancy agreements connected therewith and to discontinue its business of letting wagons on simple hire, and in pursuance of this policy during the trading year ending May 31, 1920, sold 1622 of these wagons at prices resulting in a surplus of 148,651*l.* 10*s.* 9*d.* beyond the figures at which they were then valued in the books of the company. These wagons were sold partly to the hirers and partly to other persons. The proceeds of sale of all these wagons were brought into revenue account by the company and appeared in its profit and loss accounts as passed by the company's auditors. A sum of 100,000*l.* was transferred to reserve out of the profits so ascertained for the year in question, the chairman explaining at the meeting of the company to consider the report and accounts for the year that, as it represented part of the surplus arising from the sale of simple hire wagons, the directors thought it belonged rather to the capital than to the revenue account of the company.

The Commissioners of Inland Revenue made an assessment upon the company to corporation profits tax in respect of

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the accounting period from January 1, 1920, to May 31, 1920, and included for the purposes of this assessment as a trade receipt of the company the said sum of 148,651*l.* 10*s.* 9*d.* The company appealed to the Special Commissioners, who affirmed the assessment. Referring to the argument of the appellants that the profit on these sales ought to be regarded as an accretion of capital, the Special Commissioners said: "We are unable to take this view. In our opinion we must have regard to the main object of the company, which is to make a profit in one way or another out of making wagons and rolling stock. We are unable to draw the very sharp line which we are asked to draw between wagons sold, wagons let on hire purchase and wagons let on simple hire, nor do we consider that this very sharp division in fact exists. We do not regard ourselves as precluded by the fact that as long as the wagons were let, they were treated 'as plant and machinery' subject to wear and tear, from deciding that they are stock in trade when they are sold, even though let under tenancy agreements, for they seem to us to have in fact the one or other aspect according as they are regarded from the point of view of the users or the company. In our view shortly it makes no difference that one way of making a profit out of the wagons was given up, for the very giving up itself involved the making of a profit in another way out of the same wagons, and the purpose of the company's trade is to make a profit out of wagons."

Rowlatt J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal, by a majority (Warrington L.J. and Eve J.; Pollock M.R. dissenting).

1925. Jan. 29, 30. *Sir Leslie Scott K.C.* and *Clauson K.C.* (with them *Bremner*) for the appellants. When the appellant company disposed of its letting business the sale of the simple hire wagons with their tenancy agreements was a sale of a capital asset. The Courts below were wrong in holding that the fact that the company had a selling and manufacturing business as well as a letting business prevented the surplus arising from the sale of these wagons from being a capital

accretion and made it a trade profit. It is to be noted that no wagons were built for selling stock—they were built to customers' requirements only—and no wagons were bought for selling stock. Occasionally wagons were bought for the purposes of the hiring business, and sometimes a larger number had to be bought than was required and the surplus wagons were sold by the hiring department. The plant in question was never treated as part of the stock in trade of the company. [They referred to *Lubbock* v. *British Bank of South America* (1); *Caledonian Ry. Co.* v. *Banks* (2); *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (3); *Californian Copper Syndicate* v. *Harris* (4); *T. Beynon & Co.* v. *Ogg.* (5)]

Sir Douglas Hogg A.-G. (with him *R. Hills*) for the respondents. It is not true to say that there were here two businesses. The Commissioners were right in finding that there was only one business, which was to make a profit in one way or another out of manufacturing wagons. This is a clear case of a finding of fact by the Commissioners and ample evidence to support that finding.

Sir Leslie Scott K.C. replied.

The House took time for consideration.

1925. Feb. 19. VISCOUNT CAVE L.C. My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Dunedin, and I agree with his reasoning and his conclusion.

LORD DUNEDIN. My Lords, this is an appeal against an assessment for corporation profits tax confirmed by the Commissioners, whose opinion has upon a case stated been confirmed by Rowlatt J. and the Court of Appeal.

The appellants are a company who dealt in wagons. It acquired wagons generally by construction in its own works, but also on many occasions by purchase. The wagons so acquired it dealt with in two ways. Either it sold—whether

(1) [1892] 2 Ch. 198.
(2) (1880) 1 Tax Cas. 487; 8 R. 89.
(3) 1910 S. C. 906; 5 Tax Cas. 658.
(4) (1904) 5 Tax Cas. 159; 6 F. 894.
(5) (1918) 7 Tax Cas. 125, 132.

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for cash down or on a deferred payment system matters not—or it hired them out. The hired wagons remained the property of the company, and when the hiring was over the wagon was either worn out or was sold. The hiring accounts were kept separate, but it was all one business. In the case of the wagons used in the hiring business which had been made in the workshops, the method of bookkeeping employed was to charge the wagon so used as if it had been sold to the hiring business at a price including a calculated sum added as profit on manufacture. Year by year as the hiring went on the sum so charged was written down in respect of depreciation.

The appellants finding that after the war (during the continuance of which wagon making had been prohibited) there was a great scarcity of wagons, came to the conclusion that it would be more profitable to sell all the wagons which they were using for hiring; and in the result they received sums larger than the sums at which the wagons written down as aforesaid stood in the books. It is these sums on which as profit corporation profits tax has been charged.

Now as regards the original profit when the wagon was entered with a calculated sum added to its cost on it, the tax would automatically be charged in the year's accounts, as it would enter in the revenue account as kept as profit on work done. But when in the long run on a sale a wagon which had been charged at a fictitious price—for it being all one business no money really passed—realized more than that price as it stood after depreciation had been subtracted, then I think it is evident that the sum, being the difference between the sum realized and the sum as entered minus depreciation, is just extra profit on which so far no tax has been levied.

The appellants argue that this is really a capital increment; and to say so they call these wagons plant of the hiring business. I am of opinion that in calling them plant they really beg the whole question. The Commissioners have found—and I think it is the fact—that there was here one business. A wagon is none the less sold as an incident of the

business of buying and selling because in the meantime before sold it has been utilized by being hired out. There is no similarity whatever between these wagons and plant in the proper sense, e.g., machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income. I think that the appeal fails.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD BUCKMASTER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 19, 1925.

Solicitors for the appellants: *Willis & Willis, for Taynton & Son, Gloucester.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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SOUTH BEHAR RAILWAY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Corporation Profits Tax—"British company carrying on any trade or business or any undertaking of a similar character"—Railway Company receiving Annuity in Consideration of Construction of Railway—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 52, *sub-ss.* 1, 2 (*a*), *s.* 53.

The Finance Act, 1920, by s. 52, imposes a duty called corporation profits tax on (inter alia) "the profits of a British company carrying on any trade or business, or any undertaking of a similar character."

In 1895 a company was incorporated under the Companies Acts to enter into a contract with the Secretary of State for India relating to the construction of a railway in India. By this contract the company was to find the money and materials for the construction of the railway, which was to be undertaken by the Secretary of State through such agency as he should appoint, but at the risk and cost of the company. The Secretary of State, as from the opening of the railway and until the determination of the contract, was to work and maintain the railway and was to retain a percentage of the gross receipts of the railway, the balance being the net earnings of the company. He was also to be at liberty, on giving twelve months' notice, to determine the contract at certain fixed periods and to become the owner of the railway on recouping to the company the capital expended thereon with his authority.

By a supplemental contract made in 1906, after the railway had been opened, the company, until the determination of the principal contract, was to relinquish the railway to the Secretary of State in consideration of a fixed annuity to be paid half-yearly to the company in lieu of the percentage of earnings payable under the principal contract. Since the supplemental contract the only business of the company was to receive the annuity and to declare dividends:—

Held, that the company carried on a business or similar undertaking within the meaning of s. 52 of the Finance Act, 1920, and was therefore liable to corporation profits tax.

Inland Revenue Commissioners v. *Korean Syndicate* [1921] 3 K. B. 258 approved.

Decision of the Court of Appeal [1924] 1 K. B. 390 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. (2) upon a case stated by the Special Commissioners of Income Tax.

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

(1) [1924] 1 K. B. 390. (2) [1923] 2 K. B. 514.

The facts are fully stated in the report of the case before the Court of Appeal and appear sufficiently from the opinion of the Lord Chancellor.

The question for determination was whether the appellants were a company carrying on a trade or business or undertaking of a similar character within the meaning of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, so as to be liable to be assessed to corporation profits tax under Part V. of that Act.

Upon an appeal by the appellants to the Special Commissioners against an assessment to corporation profits tax in the sum of 1554*l.* 16*s.* for the accounting period ending December 31, 1920, the Commissioners answered this question in the negative and discharged the assessment.

Rowlatt J. affirmed the decision of the Special Commissioners, but his decision was reversed by the Court of Appeal by a majority (Pollock M.R. and Warrington L.J., Sargant L.J. dissenting), and the assessment was upheld.

1925. Jan. 23, 26. *Latter K.C.* and *Bremner* for the appellants. The appellant company is not "carrying on any trade or business" within the meaning of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, and is therefore not liable to corporation profits tax. Before the agreement of 1906 the business carried on by the company was the finding of money for making the South Behar Railway, but after the money had been found and the railway made the company ceased to carry on any business and became a mere annuitant from the Secretary of State for India. The receipt of an annuity does not of itself constitute the carrying on of a trade or business; nor is the distribution of the company's income in any ordinary sense the carrying on of a trade or business. It does not follow that, if a business object is carried out, therefore a business is being carried on. Carrying on business involves the habitual doing of acts capable of producing profit and for the purpose of producing profit: *Erichsen* v. *Last* (1); *Grainger & Son* v. *Gough* (2); *Smith* v. *Anderson.* (3)

(1) (1881) 8 Q. B. D. 414, 418, 420. (2) [1896] A. C. 325, 335, 340.
(3) (1880) 15 Ch. D. 247, 277–8.

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For the purpose of the present appeal the further words of sub-s. 2 (*a*), "or any undertaking of a similar character, including the holding of investments," carry the matter no further. "The holding of investments" refers only to trust or investment companies, where the business of the company is the investment of its funds in profitable securities: *Scottish Mortgage Company of New Mexico* v. *McKelvie* (1); *Smiles* v. *Australasian Mortgage and Agency Co.* (2) As to the decisions on excess profits duty: *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (3), which decided that the reception of royalties by a company was not the carrying on of any trade or business for the purpose of excess profits duty, supports the appellants' contention; *Inland Revenue Commissioners* v. *Korean Syndicate* (4), where the Court of Appeal reversed the decision of Rowlatt J. upon the construction of the agreement in question in that case, is distinguishable, because, in the view of the Court of Appeal, the syndicate was a company which trafficked in concessions.

[They also referred to *Egyptian Hotels* v. *Mitchell.* (5)]

Sir Douglas Hogg A.-G., Sir Thomas Inskip S.-G. and *R. Hills* for the respondents were not called upon.

The House took time for consideration.

1925. Feb. 19. VISCOUNT CAVE L.C. My Lords, the question raised by this appeal is whether the appellants, the South Behar Railway Company, Ld., are liable under an assessment to corporation profits tax made upon them by the Commissioners of Inland Revenue for the accounting period ending December 31, 1920. The answer to this question turns partly on the terms of Part V. of the Finance Act, 1920, and partly on the facts of the case.

By the Finance Act, 1920, s. 52, it is enacted that subject as provided in that Act there shall be charged on all profits to which Part V. of the Act applies, and which arise in an

(1) (1886) 2 Tax Cas. 165; 14 R. 98.
(2) (1888) 2 Tax Cas. 367, 378.
(3) [1920] 1 K. B. 193.
(4) [1920] 1 K. B. 598; (C. A.) [1921] 3 K. B. 258.
(5) [1914] 3 K. B. 118, 133, 134; [1915] A. C. 1022.

accounting period ending after December 31, 1919, a duty (called "corporation profits tax") of an amount equal to 5 per cent. of those profits. The profits to which Part V. of the Act applies include "the profits of a British company carrying on any trade or business or any undertaking of a similar character, including the holding of investments." The expression "British company" is defined as meaning any company incorporated by or under the laws of the United Kingdom. By s. 53 of the Act it is provided that for the purposes of the Act profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Sch. D to the Income Tax Act, 1918, and that such profits shall include (among other things) all income arising from investments or any other source and received in the accounting period. Sect. 54 provides that for the purposes of the tax the accounting period shall be a period of twelve months ending on the date up to which the accounts of the company are usually made up.

Reading these provisions together, it appears plain that the tax is not payable by all registered companies. The words "carrying on any trade or business or any undertaking of a similar character" are of a qualifying and limiting nature, and the fact that a company exists and has not been wound up will not of itself make the company liable to the tax. On the other hand, the tax is not limited to companies carrying on trading or manufacturing concerns. It is payable by any company which carries on a business or an undertaking of a business nature, and in the case of a company which carries on such a business or undertaking the tax is payable on all its profits and gains, including the income from its investments. The words "including the holding of investments" appear to refer, not to all cases in which a company has money invested, but to cases where the holding of investments is the business or part of the business of a company. That the net of the tax was understood and intended by Parliament to be spread wide is evident from the terms of s. 43 of the Finance Act, 1922, which provides that

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corporation profits tax shall not be charged on the profits of an association which is registered under s. 20 of the Companies Act, 1908, as a company with limited liability without the addition of the word "limited" to its name, or on the profits of a company established solely for the advancement of religion or education and which under its memorandum or articles of association is prohibited from distributing any part of its profits to its members; for that section affords ground for the view that, but for the amendment thereby effected, a company of the nature described, that is to say, a company formed for promoting science, religion, charity or some other useful object, and not for the purpose of making and distributing profit, would have fallen under the tax.

The principal object for which the appellant company was formed was (as its memorandum of association shows) to enter into a contract with the Secretary of State for India in Council relating to the construction of a railway in India to be called "The South Behar Railway," and to carry the same into effect, subject to such modifications as might be agreed upon between the Secretary of State and the company, including power to enter into and carry into effect any supplemental or additional contract.

The agreement referred to in the memorandum of association was duly entered into and was dated August 7, 1895, and the pith and substance of that agreement was as follows. By cl. 3, the company was to supply to the Secretary of State the funds and materials required for the construction of the railway. By cl. 4, the Secretary of State was to provide free of cost to the company the land required for the railway, and was to allow the company to have possession of such lands during the continuance of the contract. By cl. 6, the construction of the railway was to be undertaken by the Secretary of State through such agency as he should appoint and according to designs and specifications to be approved by him, but at the entire risk and cost of the company, which was to supply the necessary funds as he might require. By cl. 19, the Secretary of State was, as from the opening of the

railway and until the determination of the contract, to work and maintain the railway and keep it supplied with rolling stock, plant and machinery. By cl. 28, the Secretary of State was in each half year to retain 45 per cent. of the gross earnings of the railway, and the remaining 55 per cent. of such gross receipts for each half year was to be the net earnings of the company. By cl. 48, the company was not during the continuance of the contract, without the sanction in writing of the Secretary of State, to engage in or carry on or apply capital to any business "other than the business provided by the contract to be carried on by the company, and business incidental or subsidiary thereto." By cl. 54, the Secretary of State was to be at liberty, by giving to the company in England not less than twelve months' previous notice in writing (therein referred to as "notice of purchase"), to determine the contract either on June 30, 1919, or on June 30 in the last year of any subsequent period of ten years, and thereupon the company was to give up to the Secretary of State all land, buildings, stores and other things, which were to become the absolute property of the Secretary of State. By cl. 56, if the contract should be determined by notice of purchase, the Secretary of State was to pay to the company out of the revenues of India, in England, such a sum as when added to any unspent capital should amount to the total paid-up capital of the company so far as such capital had been expended on the undertaking with the authorization of the Secretary of State.

The South Behar Railway was duly constructed and opened for traffic. The agreement of 1895 has not been determined, but on December 11, 1906, a further agreement was entered into between the Secretary of State and the company. By that agreement, after a recital showing that the total sum of capital money expended by the company with the authorization of the Secretary of State on the undertaking amounted to 684,580*l.*, it was agreed in substance as follows :

(Clause 2) that the Secretary of State should, as from January 1, 1906, until the determination of the contract of 1895 (therein called the principal contract), be entitled to

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hold and deal with the railway for his own benefit without any interference or control on the part of the company, and the company should accordingly relinquish the same to him.

(Clause 4) that the Secretary of State should be under no obligation to the company to work the railway.

(Clause 5) that as from January 1, 1906, until the determination of the principal contract, the Secretary of State should pay to the company in London the yearly sum of 30,000*l.* by half-yearly payments on the days therein mentioned, and the payments by the principal contract required to be made by the Secretary of State to the company should cease to be payable.

(Clause 6) that upon the determination of the principal contract by notice of purchase the said sum of 684,580*l.* should be the sum payable under cl. 56 of the principal contract as capital expended on the undertaking with the authorization of the Secretary of State.

(Clause 7) that certain clauses and parts of clauses of the principal contract therein specified (being 21½ out of a total of 59 clauses) should cease to operate.

Since the date of the last-mentioned agreement, the company has had no office in India, but has an office in England with three directors and a secretary in England, who receive the annuity of 30,000*l.* payable half-yearly by the Secretary of State and, after paying the interest on the company's debentures, hold general meetings and declare dividends in the ordinary way. The company has a sum of 6000*l.* in War Loan, but has no other investment.

In these circumstances it was contended on behalf of the company that the company no longer carries on any trade or business within the meaning of s. 52 of the Finance Act, 1920, but has become a mere annuitant, and accordingly that the company is not assessable to corporation profits tax; and the Commissioners for the Special Purposes of the Income Tax Acts, before whom the question came, so held. On a case being stated for the opinion of the High Court, Rowlatt J. agreed with the Commissioners' view; but on an appeal to the Court of Appeal that Court, by a majority,

reversed the decision of Rowlatt J. and held the company liable to the tax, Sargant L.J. dissenting. Hence the present appeal.

My Lords, I agree with the Court of Appeal in holding that the finding of the Commissioners is not a finding of pure fact, but is an inference of law founded upon the specific facts found in the case, and accordingly that the decision was open to review; and having listened to the arguments put before the House, I find myself in agreement with the conclusion of the majority of the Court of Appeal. It is true that the company carries on no trade or manufacture, and that its principal and only function at the present moment is to receive and distribute the fruits of its undertaking; but that is a part, and a material part, of the purpose for which it came into existence. It was not intended to be a trading but a financing company; and its main object was, not to construct or work a railway, but to provide funds for that purpose and, as a reward for so doing, to receive a yearly sum for a period and afterwards a lump sum by way of return of capital. Until the execution of the agreement of 1906 the yearly sum receivable by the company was dependent on the gross earnings of the railway; but except in that respect the company had no interest in the railway, and it had no right to interfere in its working. By the agreement of 1906 this fluctuating annuity was converted into a fixed annuity, and as the fixed annuity was made independent of the earnings of the railway, those provisions of the original agreement which compelled the Indian Government to continue to work the line were cancelled; but in other respects the original agreement remained and still remains in operation. The company can no longer be called upon to fulfil its first purpose—namely, to make advances for the construction of the line—because all the necessary funds have been already advanced; but it is still fulfilling its second purpose, which was to receive an income for its shareholders while the line was running and to distribute it among them, and if and when the principal agreement comes to an end, it will have the further function of recovering and dividing

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the capital to be repaid. I think, therefore, that the company still carries on a business or similar undertaking within the meaning of s. 52 of the Finance Act, 1920. The case is not unlike *Inland Revenue Commissioners* v. *Korean Syndicate* (1), with the decision in which case I agree.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs.

LORD DUNEDIN. My Lords, it is admitted that this company was no abortive paper conception, but that it actually, after its formation, proceeded to carry on business. What was that business? Necessarily, the business contemplated by its memorandum and articles of association. Now if these be read it becomes apparent that during the life of the company there would be, so to speak, two periods, the first during which the company would be active and engaged in furnishing funds and plant, the second during which it would be quiescent, and engaged in receiving its proportion of the profits of the railways which had been created through its efforts. Accordingly, up to 1906 it seems to me undoubted that this company was carrying on business.

The sole question, therefore, seems to be, did the agreement of 1906 have the effect of sending the company out of business? What was the agreement of 1906? It was simply this, that instead of taking its remuneration in the form of a percentage of profits, a sum which must necessarily fluctuate, it agreed to take a fixed sum. My Lords, I cannot think that that operated any change in what the company was doing. The appellants say that after 1906 the company became an annuitant. I do not find in the memorandum any provision which changes the company's business into that of an annuitant, if indeed such a phrase is not in itself absurd, no one ever having heard of such a business. I am, therefore, of opinion that the company carried on business after 1906 precisely as it did before, and that the appeal consequently fails.

LORD ATKINSON. My Lords, I have had the pleasure and

(1) [1921] 3 K. B. 258.

advantage of reading the judgment delivered by my noble and learned friend on the Woolsack, and I entirely concur in it.

LORD SUMNER. My Lords, the question here is whether on the undisputed facts it can be predicated of the appellant company, that, during the year of charge, it was "carrying on any trade or business or any undertaking of a similar character, including the holding of investments." Perhaps I ought to add the words "within the meaning of the Finance Act, 1920, s. 52, sub-s. 2 (*a*)," but I think this really adds nothing to the quoted words themselves, and only indicates where they may be found. The statute does not define any of these words, but leaves them to their vernacular meaning and, where the Legislature did not think fit to tread, I certainly have no mind to rush in. Nor is much help to be got from the authorities, for the expression "carrying on a trade or business" has generally been discussed in totally different contexts. Thus the distinction between a trust for holding property and a "carrying on of a business" is illustrated in *Smith* v. *Anderson* (1), but there can be no question here of any trust for holding property for beneficiaries, and the issue is between carrying on a business and being out of business altogether.

To ascertain the business of a limited liability company one must look first at its memorandum and see for what business that provides and whether its objects are still being pursued: *Korean Syndicate's* case. (2) It is common ground that the company, when first incorporated and for some years afterwards, did carry on a business, or an undertaking of a similar character, for it embarked its very considerable capital in making a railway, and there, as a matter of fact, that capital still remains. That the actual construction and working of the line were by agreement entrusted by the company to third parties does not affect the matter, for this was merely the way in which the company's business was carried on. Under the contract with the Secretary of State

(1) 15 Ch. D. 247. (2) [1921] 3 K. B. 258.

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for India, which the company was formed to enter into, the line may be sufficiently, if not exactly, described as a line built with the company's money on land provided by the Secretary of State, and worked for the company by the Secretary's nominees for 45 per cent. of the gross earnings. The residue of the gross earnings belonged to the appellants. Under this system, the profits made by the company in carrying on this business would certainly vary from year to year and may have been precarious, but such as they were, they accrued from the company's interest in the working of the line, which its money had built. In 1906, this system was altered by a further agreement and, instead of sharing in the gross takings of the line, the company now received from the Secretary of State a fixed sum of 30,000*l.* a year. This sum was not to be secured by any charge or lien on the railway or its earnings, but, as the original contract provided for no such security for the company's share of the gross takings, this provision seems to have been inserted merely ex abundanti cautela. In other important respects the principal contract remained unaffected, although it may well be, that, during the year of charge and other years both before and after it, some of the provisions of the contract did not in these respects actually become operative. Thus the right of the Secretary of State to purchase the line at a defined price remained and remains unexercised and in being. Accordingly as long as the Secretary of State caused his current obligations to be discharged and did not exercise this right of purchase, the line built with the company's money would remain beyond its control and the capital embarked in it would be unrealizable. So, too, sundry obligations upon the company to find further capital remained outstanding, e.g., for the repair of extraordinary damage to the line, and for reasonable alterations in or additions to it. Thus the change made in 1906 would appear to have been less considerable than it looks at first sight. The company's capital was locked up as before and might be liquidated as before, if the right of purchase were exercised. The outstanding and contingent obligations remained as before. A fixed sum, for which

the Secretary of State was liable, replaced that fixed percentage of gross earnings, over which, for better for worse, the company had no control. This, then, was the only substantial change, and the fact that, under the old regime, the company was a sharer in the takings and under the new one was only the Secretary of State's annuitant, really makes remarkably little difference.

My Lords, under the old regime the company admittedly carried on a business and made money out of it. The fact that the fluctuating profits or gains accruing under the former agreement (if earned) became, under the latter, a fixed amount of gains payable by the Secretary of State, whether they were earned or not, makes no difference. In my opinion it is of little use to ask whether the company could have been wound up, the purpose of its incorporation having been accomplished, or whether, if its shareholders had themselves carried on its actual activities during the year of charge without being incorporated, they would have constituted an illegal association. It is obvious that the company's objects have by no means been accomplished. It is obvious, too, that during its present period of dormant life it has very little to do. I do not attach much importance to the domestic operations of declaring and paying dividends, remunerating directors and presenting reports, but the operation of receiving and thus discharging the annuity payments goes on continuously, and, however simple, it is not a mere passive acquiescence. It is the transaction of business between debtor and creditor resulting periodically in the discharge of a debt. The present is not the case of a company existing to do one act only and once for all. Not only did the company make the agreement of 1896, but it plays its recurring part in every payment and receipt of gains, and there is here, therefore, that "repetition of acts" which Brett L.J. says (1) is implied in "carrying on business." The important thing is that the old business still continues of getting some return for capital embarked in the line. There has not been such a termination of the business formerly carried on or such a

(1) 15 Ch. D. 277.

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complete transfer of it to a new trading company as has been held to be the criterion of ceasing to carry on business under the Bank Charter Act, 1844, s. 12: *Attorney-General* v. *Birkbeck* (1); *Prescott, Dimsdale, Cave, Tugwell & Co.* v. *Bank of England.* (2) If, as was held in *In re Dagnall* (3), a married woman continues to carry on business for the purpose of 45 & 46 Vict. c. 75, s. 1, sub-s. 5, as long as her trade debts remain undischarged, there would seem to be a presumption that a company continues to carry on business as long as it is engaged in collecting debts periodically falling due to it in the course of its former business. Business is not confined to being busy; in many businesses long intervals of inactivity occur. In the present case, at any rate, I think that no change has occurred to enable your Lordships to say that the company's carrying on of business is a thing of the past, or that the Commissioners could properly find that it is so. Indeed, I do not think there has been much change. The concern is still a going concern though a very quiet one.

I am accordingly of opinion that the appeal fails.

LORD BUCKMASTER. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 19, 1925.

Solicitors for the appellants: *Sandersons & Orr-Dignams.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

(1) (1884) 12 Q. B. D. 605. (2) [1894] 1 Q. B. 351.
(3) [1896] 2 Q. B. 407.

[HOUSE OF LORDS.]

TRUSTEE OF THE PROPERTY OF ELLIS AND COMPANY . . . . . } APPELLANT;

AND

DIXON-JOHNSON . . . . . RESPONDENT.

H. L. (E.)* 1925 *Feb.* 20.

Bankruptcy—Speculative account with Brokers—Deposit of Shares with Brokers to secure current Balance—Unauthorized Sale of Shares by Brokers—Right of Brokers to recover Balance—Obligation to return Shares—Bankruptcy of Brokers—Right of Trustee in Bankruptcy—Breach of Contract—Damages—Account of mutual Dealings—Set-off—Date for ascertaining Value of Shares—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

The defendant opened a speculative account with a firm of stock-brokers and deposited with them as security for any debit balance which might from time to time be owing by him on that account the indicia of title to various bonds and shares, including certain rubber shares. In 1920 the firm sold the rubber shares without the knowledge or authority of the defendant, who was kept in ignorance of the sale till after the bankruptcy of the firm. On February 16, 1922, a receiving order was made against the firm and they were adjudicated bankrupt. In February, 1923, the trustee in bankruptcy of the firm rendered the defendant a final account, which, after giving credit to the defendant for the proceeds of the sale of the shares, showed a balance due from the defendant. In an action to recover that balance the trustee claimed that the rights of the parties ought to be adjusted under the mutual credits clause of the Bankruptcy Act, 1914, as at the date of the receiving order. Lawrence J., in ordering an account to be taken, directed that the value of the shares, to be ascertained when the account was certified (that being the date when the shares ought to have been returned to the defendant), should be set off against the claim of the trustee:—

Held, that the brokers could not have maintained an action for their debt if they were not in a position to hand over the shares against payment, and that the trustee in bankruptcy had no higher right; that no question of set off arose under the mutual credits clause of the Bankruptcy Act, 1914, the right of the defendant being to a return of the shares in specie; and that in the special circumstances of the case the order of Lawrence J. was correct.

Order of the Court of Appeal [1924] 2 Ch. 451 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming by a majority (Warrington and Sargant L.JJ.; Pollock M.R. dissenting) an order of Lawrence J. (2)

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

(1) [1924] 2 Ch. 451. (2) [1924] 1 Ch. 342.

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ELLIS & Co.'s TRUSTEE v. DIXON-JOHNSON.

The facts, as stated by Lawrence J., are set out in both the reports in the Courts below and are summarized in the headnote.

Feb. 19, 20. *Owen Thompson K.C.* and *E. W. Hansell* for the appellant. The rights of the parties are to be adjusted as at the date of the receiving order. The bankruptcy of the brokers necessarily involved the closing of the account, because the brokers ceased to be brokers and the trustee in bankruptcy was not a broker. The Bankruptcy Act of 1914 takes away rights and substitutes others, and provides that all creditors are to be put together for the purposes of administration. By s. 7, coupled with s. 53, the property of the bankrupt is vested in the official receiver until the appointment of a trustee and then in the trustee. Sect. 30 shows that the claim of the respondent in this case is capable of being expressed in terms of money, and s. 31 provides that where there are mutual dealings the right of set off arises at the date of the receiving order: *In re Daintrey* (1); *In re Taylor.* (2) The question here is not whether a mortgagee is entitled to sue without restoring the property, but whether a mortgagee, having sold a small part of the property, is entitled to sue without restoring that part. He may ask for judgment for the balance, giving proper credit for the part wrongfully sold. If this is a question of wrongful conversion, the date for assessing the damages must be the date of the wrongful conversion: *Di Ferdinando* v. *Simon, Smits & Co.* (3); *S.S. Celia* v. *S.S. Volturno.* (4) If the relationship between the brokers and the respondent was that of mortgagee and mortgagor, then on making the receiving order the defendant became immediately liable to pay the balance due from him and simultaneously was entitled to a return of the shares or to their value as ascertained by the sale, that value being higher than their value at the date of the receiving order. How can it be said that anything which

(1) [1900] 1 Q. B. 546, 549, 556, 571, 580.
572.
(2) [1910] 1 K. B. 562, 568,
(3) [1920] 3 K. B. 409.
(4) [1921] 2 A. C. 544, 547-8, 562.

happened after the receiving order could affect the rights of the parties ?

[They also referred to *Tilley* v. *Bowman* (1) and *Deverges* v. *Sandeman, Clark & Co.* (2)]

Jenkins K.C. and *C. B. Marriott* for the respondent were not called on.

VISCOUNT CAVE L.C. My Lords, the facts in this case have been fully stated by Lawrence J. I will not repeat them, but will proceed to deal with the legal position.

I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security; and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt. If that rule had been strictly applied on the hearing of this action, the action must have been then and there dismissed. But Lawrence J. took note of the fact that in this case the missing security consisted of shares which could be replaced by purchasing them on the market; and he applied the rule with this variation, that he directed the Master to whom it was remitted to ascertain the amount of the respondent's debt, to ascertain the market value at the date of his certificate of the missing shares, and to set that value off against the debt. Whether this direction so given took precisely the right form, need not now be considered. Speaking generally, it was a reasonable course to take, and if the shares had fallen in price it would have been advantageous to the trustee in bankruptcy; but as it turned out, the modification adopted by the learned judge was of no advantage to the trustee, as the value of the shares when ascertained in accordance with his direction exceeded the amount of the debt and there was nothing for the trustee to recover; and the action has now been dismissed.

It is argued on behalf of the appellant that by reason of the bankruptcy of the creditors the rule to which I have referred should not have been applied in this case, but that

(1) [1910] 1 K. B. 745. (2) [1902] 1 Ch. 579.

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a balance should have been struck as at the date of the receiving order, and that either the amount realized on the sale of the shares before that date or damages for their sale should have been set off under s. 31 of the Bankruptcy Act against the debt, and judgment given for the balance. I am unable to understand how the bankruptcy can have so modified the rights of the respondent. If immediately before the bankruptcy the brokers had sued the respondent for the balance owing on his account, they would have been met and defeated by the equitable rule to which I have referred. The effect of the bankruptcy was to close the account which had been running and to transfer the rights of the brokers to the trustee in their bankruptcy. But the rights of the trustee were no larger than had been the rights of the brokers and were subject to the like condition as to the return of the securities. There was no mutual credit within the meaning of s. 31 of the Act, for the right of the defendant (the present respondent) was not to a money payment present or future, but to a return of his shares in specie as and when he paid off his debt. This right he used, and was entitled to use, as a weapon of defence only, and no question of a cross claim or set off really arose. It is true that in some of the letters written on behalf of the respondent, and even in the defence, a somewhat different position was for a time taken up; but the learned judge at the hearing considered the actual rights of the parties, and any necessary amendment of the pleadings must be taken to have been allowed.

My Lords, upon the whole matter I think that the decision of Lawrence J. and of the majority of the Court of Appeal was right, and accordingly that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN. My Lords, I concur.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur. I only wish to add one word. In both Courts below this transaction has been

spoken of as an equitable mortgage. In practice and I think in a good many decisions, very similar, if not identical, transactions have been spoken of as pledges. I express no opinion upon the question, which this deposit of security really was, because it appears to me that on either view the inability of the mortgagee, or the pledgee, as the case may be, to return the security against payment of the debt equally constituted a defence to the debtor under the circumstances.

LORD BUCKMASTER. My Lords, in expressing my opinion on this appeal, I cannot divest my mind of the idea that the underlying relationship to be considered is that established between the respondent and the firm of Ellis & Co. by the deposit with them of certain share certificates accompanied by blank transfers as security for the account he had opened with them as his stockbrokers. Messrs. Ellis & Co., through G. L. Bevan, a member of the firm, sold the shares without authority and subsequently delivered to the respondent an account purporting to treat them as still unsold. The respondent consequently knew nothing of the wrongful dealing with his property until some time after the receiving order had been made against the firm, an event which took place on February 16, 1922. When information was given to him as to the fact of the sale a correspondence passed, in which it was uncertain at one moment as to what line the respondent would take, but it is admitted that he never adopted the sale. Ultimately the trustee in bankruptcy of Messrs. Ellis & Co. took proceedings and sued the respondent on a specially endorsed writ for the balance of the account as on February 16, 1922, credit being given for the price of the shares on that day. Had all the admitted facts been stated on that endorsement the action would have been demurrable, because the plaintiffs were not in a position to hand over the securities, and consequently were not able to maintain the action. It is perfectly true that originally such an action was maintainable at law and was restrained in equity, but now whenever the principles of law and of

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equity are in conflict the principles of equity prevail. No steps were, however, taken to stay the proceedings and the action came on for trial before Lawrence J., when for the first time the rights of the parties were adjusted, not with strict regard to the pleadings in the matter—the pleadings appear to me to have overlooked the most critical point in the case—but upon the footing that the respondent was entitled to redeem his securities and the appellants upon payment were bound to hand over to him either the securities themselves or to give him credit for their money equivalent as at the date when the account was certified. That is in the result the view taken both by Lawrence J. and by the majority of the Court of Appeal, and, so far as I can understand, it is the view that would be accepted by the appellants, unless, as they contend, the Bankruptcy Act has altered the whole relationship.

Now s. 7 of the Bankruptcy Act, 1914, upon which the appellants rely does not appear to me to touch the matter in the least; it merely provides that "no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt." A mortgagor is not the creditor of his mortgagee. He has merely the right to redeem, which is wholly unaffected by that section, and I desire to repeat what Lord Hatherley, then Lord Chancellor, said in the case of *Stone* v. *Thomas* (1): "The jurisdiction of this Court" (referring to the Court of Chancery) "is not ousted unless there is an express enactment in the statute which provides a new jurisdiction." He was dealing there with an attempt to administer in Chancery the trusts of a deed registered under the Bankruptcy Act of 1861, and he held there was nothing to render the relief in Chancery more effectual than in bankruptcy and refused the application. But the principle enunciated is plain, and I can see nothing either in s. 7 or in the other sections to which our attention has been directed to oust the jurisdiction of the Court of

(1) (1870) L. R. 5 Ch. 219, 224.

Chancery to deal with the rights of a mortgagor who seeks redemption of his mortgaged securities.

For these reasons I am of opinion that the motion made from the Woolsack should be acceded to.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 20, 1925.

Solicitors for the appellants: *Piesse & Sons.*

Solicitors for the respondents: *Vandercom, Stanton & Co.*

[HOUSE OF LORDS.]

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SWEDISH CENTRAL RAILWAY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THOMPSON . . . . . RESPONDENT.

Revenue—Income Tax—Residence—Company incorporated in England—Registered Office in England—Business carried on Abroad—Dual Residence—Liability to Taxation—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

A registered company can have more than one residence for the purposes of the Income Tax Acts.

So *held* by Viscount Cave L.C., Lord Dunedin, Lord Sumner, and Lord Buckmaster; Lord Atkinson dissenting.

Cesena Sulphur Co. v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Same* (1876) 1 Ex. D. 428, *De Beers Consolidated Mines* v. *Howe* [1906] A. C. 455, *Mitchell* v. *Egyptian Hotels* [1915] A. C. 1022, *New Zealand Shipping Co.* v. *Thew* (1922) 8 Tax Cas. 208, and *Bradbury* v. *English Sewing Cotton Co.* [1923] A. C. 744 discussed.

Dictum of Buckley L.J. in *American Thread Co.* v. *Joyce* (1912) 6 Tax Cas. 1, 31 approved.

A company was incorporated in 1870 under the Companies Acts, 1862 and 1867, with the object of constructing and working a railway in Sweden. The registered office of the company was in London. In

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

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1900 the company leased its railway to a traffic company for fifty years at an annual rent of 33,500*l.*, which was to be paid to the company in England. The company's articles were afterwards altered for the purpose of removing the control and management of the business of the company from England to Sweden, and it was admitted that the business of the company had since been and now was controlled and managed from the head office in Sweden. In 1920 a committee was appointed by the directors of the company to transact merely formal administrative business in the United Kingdom, such as dealing with transfers of shares in the United Kingdom, affixing the seal of the company to share and stock certificates, and signing cheques on the London banking account of the company. Since 1920 no meetings of the company had been held in the United Kingdom. All dividends had been declared in Sweden, and no profits had been transmitted to the United Kingdom except in payment of dividends to the shareholders in the United Kingdom. Since 1920 the annual rent under the lease to the traffic company had been paid to the company in Sweden.

On an appeal by the company against an assessment to income tax under Case V. of Sch. D in respect of the rent of the railway for the years ending on April 5, 1921 and 1922, the Special Commissioners, while finding that the business of the company was controlled and managed from Sweden, held that the company was a person residing in the United Kingdom and affirmed the assessment:—

Held (by the same majority) that, the company might have a residence here as well as abroad and that, on that assumption, there was evidence to support the conclusion of the Commissioners.

Decision of the Court of Appeal [1924] 2 K. B. 255 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question raised by the appeal was whether for the purposes of the Income Tax Acts the appellant company ought on the facts to be regarded as residing in the United Kingdom within the meaning of Sch. D, Case V.

The facts are stated in the report of the case before the Court of Appeal and also in the opinion of the Lord Chancellor.

The Special Commissioners found that the real control and management of the business of the company had been since 1920 and still was in Sweden, but held upon the authority of a passage from Lord Sumner's judgment in *Mitchell* v. *Egyptian Hotels* (2) that the company was a person residing in the United Kingdom and confirmed the assessment appealed against. This determination was affirmed by Rowlatt J.,

(1) [1924] 2 K. B. 255. (2) [1915] A. C. 1022, 1039.

and the decision of the learned judge was in turn affirmed by the Court of Appeal by a majority (Pollock M.R. and Warrington L.J.; Atkin L.J. dissenting).

1925. Jan. 26, 27, 29. *Maugham K.C.* and *Latter K.C.* (with them *Bremner*) for the appellants. The question is whether a company whose business is carried on in Sweden can be regarded as residing in the United Kingdom for income tax purposes because its registered office is in England. According to the test laid down by this House a company resides where its real business is carried on, and the real business is carried on where the central management and control actually abides: *De Beers Consolidated Mines* v. *Howe* (1); *American Thread Co.* v. *Joyce* (2); *New Zealand Shipping Co.* v. *Thew.* (3) In this case the Special Commissioners have found that the real control and management of the appellant company is in Sweden, and their decision that the company is resident in the United Kingdom is contrary to the principle laid down by this House. That is a principle of universal application and applies equally to companies registered abroad and registered in the United Kingdom. It is true that in all the cases above cited the House was dealing with foreign companies, but no reliance was placed on that fact. In *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Nicholson* (4), which came before a Divisional Court, the reasoning of the Court in determining the residence of the companies in question, both of which were registered in England, involved the same principle. Huddleston B. there expressly stated that the registration of a company was not conclusive of its residence, any more than birth was conclusive in the case of an individual, and that the residence of the company was determined by the place where the real business was carried on, although on the facts the Court decided that the place of registration and the place of control coincided. That reasoning has been approved and adopted by this House in the *De Beers* (1) and *New Zealand Shipping*

(1) [1906] A. C. 455, 458.
(2) (1913) 6 Tax Cas. 163.
(3) 8 Tax Cas. 208, 229.
(4) 1 Ex. D. 428, 453, 454.

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Co.'s (1) cases. The principle above stated is inconsistent with the notion that a company can have more than one residence—at any rate a company carrying on a single business. Multiple residence, if it can be attributed to a company at all, must depend on control. Thus, if a company carries on business here with branches abroad it is resident here. In *Bradbury* v. *English Sewing Cotton Co.* (2), which was a later stage of *American Thread Co.* v. *Joyce* (3), this House had to determine, not merely the residence of a company, but the locality of its shares, and it adopted the same principle. There cannot be two localities of shares.

[LORD DUNEDIN referred to *Levesque* v. *Smith.* (4)]

In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5) this House held that the business of the company was carried on partly in England and that consequently the company was taxable in respect of the full amount of its profits; but, if the place of incorporation was decisive of residence, the whole of Lord Halsbury's judgment was unnecessary. *Mitchell* v. *Egyptian Hotels* (6), where the House was equally divided, follows the same line of thought—namely, that residence depends on control and not upon registration. And see *Daimler Co.* v. *Continental Tyre and Rubber Co.* (7)

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. Unless it is established that central control is the sole and conclusive test of residence, and that a company cannot have two residences, the finding of the Commissioners disposes of the case. No doubt if dual residence for income tax purposes is impossible the Crown fails. In *Goerz & Co.* v. *Bell* (8) Channell J. thought that there was much to be said in favour of the view that a company might have two residences. So in the *De Beers* case in the Court of first instance (9) Phillimore J. suggested that a company, no less than a person, might have two residences. In that case the question was whether incorporation abroad rendered it impossible that the

(1) 8 Tax Cas. 208, 229.
(2) [1923] A. C. 744.
(3) 6 Tax Cas. 163.
4) (P. C.) not yet reported.
(5) [1896] A. C. 31, 38.
(6) [1915] A. C. 1022.
(7) [1916] 2 A. C. 307, 319, 339.
(8) [1904] 2 K. B. 136, 146.
(9) [1905] 2 K. B. 612, 632.

company should reside here. Lord Loreburn, in deciding that question in the negative, was careful not to say that the company could not reside elsewhere. That case only decides that central control constitutes a residence; it does not decide that there may not be another. In *American Thread Co.* v. *Joyce* (1) Buckley L.J. was of opinion that a corporation, like an individual, might have more than one place of residence, and in *Bradbury* v. *English Sewing Cotton Co.* (2) Sankey J. took the same view. The decision of this House in *Mitchell* v. *Egyptian Hotels* (3) really involves this principle. *New York Life Insurance Co.* v. *Public Trustee* (4) also supports the view that a company may have two residences, but that was not a taxing case. If necessary, it is submitted a company has a residence where its registered office is, though it may also have a residence where its central control abides. There is nothing in any of the decisions of this House which ought to have prevented Atkin L.J. from deciding according to his own inclination in favour of the Crown.

Maugham K.C. replied.

The House took time for consideration.

1925. March 13. VISCOUNT CAVE L.C. My Lords, the appellant company was incorporated under the Companies Acts in the year 1870, with the object of constructing and working a railway in Sweden. This railway was duly constructed, and in the year 1900 was leased by the company to a Swedish company for a term of fifty years at the yearly rent of 33,500*l.* In October, 1920, a special resolution was passed altering the articles of association of the appellant company so as to remove the control and management of the business of the company from England to Sweden; and since that time the general meetings of the shareholders (of whom the majority are of Swedish nationality) and the meetings of the board have been held in Sweden, all dividends have been declared there, and no part of the profits of the

(1) 6 Tax Cas. 1, 31.
(2) (1921) 8 Tax Cas. 481, 491.
(3) [1915] A. C. 1022.
(4) [1924] 2 Ch. 101, 110.

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company has been transmitted to the United Kingdom except for payment of dividends to the shareholders in the United Kingdom. In exercise of a power conferred by the articles of association, as altered by the special resolution, the board, on October 22, 1920, appointed three directors to be a committee to deal with transfers, to attach the seal of the company to share and stock certificates, and to sign cheques on the London banking account of the company. Since that time this committee has met regularly in London for the purposes mentioned. The secretary of the company resides in London, and the seal of the company is kept at the registered office of the company in London. The company has a banking account in London. Transfers of shares are made in London and registered there. The accounts of the company are made up and audited in London. Dividends are paid to English shareholders and interest to English debenture holders from the registered office in London.

In these circumstances the General Commissioners assessed the company to income tax under Case V. of Sch. D in respect of the yearly rent of 33,500*l.* for the years ending on April 5, 1921, and April 5, 1922. On appeal to the Special Commissioners, those Commissioners confirmed the assessment but stated a case for the opinion of the High Court. In this case the Commissioners stated the above facts and, while finding that the business of the company "has been and now is controlled and managed from the head office, Stockholm, Sweden," they also held that the appellant company was "a person residing in the United Kingdom" and assessable under Case V. of Sch. D. They further held that the agreement of 1900 was a lease and that the 33,500*l.* was "rent" within the meaning of r. 1 of the rules applicable to Case V., so as to be taxable on the full amount and not only on the share remitted to the United Kingdom; and on this point no question is now raised.

Upon the argument of the case stated before Rowlatt J. the learned judge held that the Commissioners were right in their decision; and on appeal to the Court of Appeal, that Court by a majority confirmed the decision of Rowlatt J.

Atkin L.J. dissented, being of opinion that he was bound by the authorities to hold that a company could only have one residence for the purposes of the Income Tax Acts, such residence being the place where (in the words used by Lord Loreburn in *De Beers Consolidated Mines* v. *Howe* (1)) the real business of the company is carried on and where the central management and control actually abides. The present appeal is against this decision of the Court of Appeal.

My Lords, in my opinion a registered company can have more than one residence for the purposes of the Income Tax Acts. It has often been pointed out that a company cannot in the ordinary sense " reside " anywhere, and that in applying the conception of residence to a company it is necessary (as Lord Loreburn said in the *De Beers* case) to proceed as nearly as possible upon the analogy of an individual. " A company," he said, " cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. . . . . The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills Co.* v. *Nicholson* and the *Cesena Sulphur Co.* v. *Nicholson* (2), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income tax to have a residence in that place: but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: see *Cooper* v. *Cadwalader* (3): and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may " keep house and do business " in more than one place; and if so, it may have more than one residence.

(1) [1906] A. C. 455, 458. (2) 1 Ex. D. 428.
(3) (1904) 5 Tax Cas. 101.

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When the authorities are examined, they do not appear to me to be inconsistent with the above view. In *Cesena Sulphur Co.* v. *Nicholson* and *Calcutta Jute Mills Co.* v. *Same* (1) it was held that a company which was registered in the United Kingdom and whose directors managed from this country a foreign business, was resident in the United Kingdom within the meaning of the Income Tax Acts: but the question whether such a company also resided in the country where its business was carried on was not considered, and Kelly C.B. left open the question whether the same joint stock company might reside at more than one place. In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2) it was held that a company registered in the United Kingdom and carrying on its business partly here and partly abroad was taxable under Case I. and not under Case V. of Sch. D. It was plain that the company was resident here, and no question of double residence arose. In *Goerz & Co.* v. *Bell* (3) the decision was that a company registered in a foreign country but having its head office and central management in London, was taxable here as a person residing in the United Kingdom. The question whether a company could have two residences was not material; but Channell J. said: "It is possible—though I do not decide the question one way or the other—that the company may have two residences. . . . . That is clear in the case of a person, and I think the condition of things might be the same with regard to a company." In *De Beers Consolidated Mines* v. *Howe* (4), which was a case of a company registered in a British colony and partly managed from London, the decision was in accordance with that given in *Goerz & Co.* v. *Bell.* (3) Phillimore J., in giving judgment in the High Court, said, "As was pointed out in *Goerz & Co.* v. *Bell* (3), a person and a company may have for the purposes of taxation two residences"; and on appeal to the House of Lords no opinion to the contrary was given. *American Thread Co.* v. *Joyce* (5) was another case in which a company

(1) 1 Ex. D. 428.
(2) [1896] A. C. 31.
(3) [1904] 2 K. B. 136, 146.
(4) [1905] 2 K. B. 612, 632; [1906] A. C. 455.
(5) 6 Tax Cas. 1, 163.

registered abroad but controlled and managed in the United Kingdom was held to be resident here; and Buckley L.J., in giving judgment in the Court of Appeal, said: "A corporation, like an individual, may have more than one place of residence."

In all the cases above cited the companies concerned—some of them registered here and others registered overseas—were controlled and managed (either wholly or partly) by an English board meeting in England; and this being so, they were held to be "resident" here and taxable under Case I. In these circumstances the question whether they were also resident elsewhere did not arise, and the expressions quoted above as to the possibility in such a case of a double residence were in the nature of obiter dicta. But in *Egyptian Hotels* v. *Mitchell* (1) the point which is now under discussion actually arose. In that case a company incorporated in the United Kingdom carried on a hotel business in Egypt; and under the articles of association, as altered by special resolution, the company's affairs were to be carried on and managed by a local board meeting in Egypt, and the powers of the London board were confined to keeping accounts, recommending dividends, and controlling the capital. It was admitted that the company resided in England for the purposes of the Income Tax Acts; and the question for decision was whether the company's trade was carried on partially in England so that it was taxable under Case I. in respect of its whole profits in accordance with the *San Paulo* case (2), or whether, the trade being carried on wholly abroad, it was assessable only under Case V. in respect of profits received in this country. The decision of the Court of Appeal was that the whole control and management of the company's trade was in Egypt and not here, and accordingly that Case V. and not Case I. applied; and on appeal to this House, the voices being equal, the decision of the Court of Appeal was upheld. It is noticeable that the facts, as found by the Commissioners and interpreted in the Court of Appeal and in this House, were sufficient

(1) [1914] 3 K. B. 118; [1915] A. C. 1022.
(2) [1896] A. C. 31.

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according to the principle of the *De Beers* case (1) to establish residence in Egypt, so that, if a company can have but one residence—namely, the place where its control and management abides, it must have been held that the company being resident in Egypt was not resident here, and accordingly was not taxable at all; but no such suggestion was made either by counsel or by any member of the tribunals by which the decision was given and upheld. This being so, while the case does not expressly decide that a company may have two residences for income tax purposes, the decision appears to be inconsistent with any other view.

In *New Zealand Shipping Co.* v. *Thew* (2) the principle of the *De Beers* case (1) was again applied by this House to a company registered overseas; but again no question of a double residence arose.

There remains the case of *Bradbury* v. *English Sewing Cotton Co.* (3), as to which, in view of the interpretation put upon it by Atkin L.J., it is necessary to say something. In that case the question arose whether dividends paid by the American Thread Company at a time when, according to the above cited decision in *Joyce's* case (4), it was controlled and managed from Liverpool and was for income tax purposes resident there, were to be treated in the hands of an English shareholder as profits from a foreign business; and it was held by the Court of Appeal and by this House that they were not. The Crown, having established in *Joyce's* case (4) that the profits of the company during the period in question were for the purpose of taxing the company to be treated as earned here, could not now be heard to say that for the purpose of taxing the shareholders they were earned abroad. The source of income was the same in both cases. It is obvious that, so far as the decision goes, the case did not establish that a company can have only one residence; and my own observations, to which Atkin L.J. refers, were not directed to any question of residence but to the position of the shares as a source of income for income tax purposes. The point

(1) [1906] A. C. 455.
(2) 8 Tax Cas. 208.
(3) [1923] A. C. 744.
(4) 6 Tax Cas. 1, 163.

to which I was directing my attention is very clearly put by Lord Wrenbury in his speech in the same case. (1)

From the above examination it would appear that, while the authorities may not establish the possibility of a company having more than one residence for income tax purposes, they are at least not inconsistent with that view. I do not cite the decisions as to the residence of a company for the purpose of founding jurisdiction, because they relate to a different subject matter; but, so far as they go, they point to the same conclusion. I hold, therefore, that a company may, for income tax purposes, have a residence here as well as a residence abroad.

In the present case it was found by the Commissioners that, while the business of the company was controlled and managed from the head office at Stockholm, so that the company would in the contemplation of English law have a residence in Sweden, the company was resident in the United Kingdom for the purposes of the Income Tax Acts; and it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist, were sufficient to enable them to arrive at their finding. It may be noted that the distinction between Case I. and Case V., which bulked so largely in some of the cases cited, is immaterial in the present case; and it need not now be considered.

For the above reasons I am of opinion that this appeal fails and should be dismissed with costs.

LORD DUNEDIN. My Lords, I have had the advantage of perusing the judgment just delivered by the Lord Chancellor. He has to my mind so exhaustively and satisfactorily

(1) [1923] A. C. 767.

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examined the cases bearing on the subject, that, agreeing as I do with all he has said, I should only be guilty of repetition if I examined them for myself. I only wish to add two observations.

The first is that inasmuch as Lord Loreburn in the *De Beers* case professedly founded his judgment on the decisions in *Calcutta Jute Mills Co.* and *Cesena Sulphur Co.* (1), in both of which cases the place of registration coincided with the place of the head office where the business was really managed, it is impossible to hold that the test of the latter alone affords a test of the sole residence possible in the case of a company; and the dictum of Lord Loreburn is really the sheet anchor of the appellants' contention.

The second is that in view of what the Lord Chancellor has just said as to the terms of his own judgment in *Bradbury* v. *English Sewing Cotton Co.* (2), I think it expedient to remark that there is no inconsistency between the decision in that case and the decision in *Levesque* v. *Smith* in the Privy Council (not yet reported). There the question did not turn on residence but on the locality of property; but I have no doubt that there also there was given an example of a company which had more than one residence.

LORD ATKINSON. My Lords, I have read and anxiously considered the judgments which have just been delivered by my two noble friends who have preceded me. I regret extremely that I am unable to concur with either of them. I take the view of the authorities expressed at length in the able judgment delivered in the Court of Appeal by Atkin L.J., and, like him, am convinced that these judgments cannot be reconciled with the cases which have been decided in this country during the last half century. On the question of the mode of acquisition by an incorporated company of a residence here, within the meaning of the Income Tax Acts, Atkin L.J. has clearly and ably analyzed most, if not all, of the authorities dealing with it. I need not attempt to perform again the task he has so well performed, and as the facts

(1) 1 Ex. D. 428. (2) [1923] A. C. 744.

have been already fully stated, I need only restate them as far as it may be necessary to make this my judgment intelligible. I express no opinion as to whether it would be wise or unwise, just or unjust, manageable or embarrassing to confer upon incorporated companies the privilege of acquiring legally, for the purpose of the Income Tax Acts, two or more residences; but I have the strongest opinion that such an acquisition would conflict with the principles embodied in the authorities I have mentioned. It is, I think, not only not authorized by them; but is, on the contrary, in effect, forbidden by them. The word "person" is, no doubt, frequently used in Sch. D of the Income Tax Acts, and, of course, I am aware that an incorporated company is, according to our law, a "person," and that, therefore, companies which, like the appellant company in this case, manage great commercial or manufacturing enterprises in different parts of the world must answer to the description of persons to come within the reach of the Income Tax Acts. I have seen that it has been frequently said in argument in some of the authorities to which we have referred, if not in this case, "that if an individual, a real person, can acquire as many residences as he pleases, why should not this fictitious person, a company, be permitted by the law to do the same." A false analogy is the most misleading of all things. And I think if one considers even for a moment the means and methods by which a real person can acquire a residence, or several residences, it will be obvious that there is no real analogy between the two processes, and that the inference suggested by this question cannot reasonably be drawn. A real person can acquire a residence in a house by eating and sleeping in it, though he should be a hopeless paralytic, or an imbecile or a lunatic, or whether he is capable of transacting business, or has any business to transact, or whether he moves from house to house to improve his health, or promote his pleasure, or gratify his whims, whereas these incorporated companies have, as a rule, great enterprises to promote, conduct, govern and control. It was because of this, I think, that Lord Loreburn, in giving judgment in this House, in the

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De Beers case (1), said first: "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business." Further on he states what he means by the words "doing business." He said, "The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills* v. *Nicholson* and the *Cesena Sulphur Co.* v. *Nicholson* (2), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides." That judgment was concurred in by the four other members of the House who heard the case. But if the true rule be, as Lord Loreburn said, that the residence is where "the central management and control abides," then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that "the central control and management of a company" can at the same time abide in two or more different and separated places. I think this House is now bound by the decision on the *De Beers* case. (1) If it be desirable to alter the law as there laid down, it should, I think, be done by the Legislature, not by this House, and I, therefore, concur with Atkin L.J. This is, I think, the first case in which it has been attempted to alter it. This was not, however, the only point that was decided in the *De Beers* case. (1) The House, following the decisions of Kelly C.B. and Huddleston B., in the *Calcutta Jute* case and *Cesena* case (2), decided, in effect, that neither in the case of English companies nor in that of foreign companies does the place of registration under the Companies Act of 1862 or 1867, or in the case of the latter companies under any similar legislation, suffice per se to fix, according to English law, the residence of a company.

In the case of the *Calcutta Jute Mills Co.* v. *Nicholson* (2) the company was incorporated under these same statutes of 1862 and 1867. It was not registered or incorporated elsewhere.

(1) [1906] A. C. 455, 458. (2) 1 Ex. D. 428.

In the case of the *Cesena Sulphur Co.* v. *Nicholson*, which was heard and decided immediately after and reported with the other, the company was incorporated under the same Acts, but was afterwards registered for all purposes in Italy. The then Attorney-General, Sir John Holker, apparently contended on behalf of the Crown that the registration of a company furnished conclusive evidence of its residence, and that if a company was registered in England it must be held to reside in England. Huddleston B., in dealing with this contention (1), said he could not assent to that proposition, and he continued: "I think the answer which was given during the argument is a good one. It is this:—Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others. If you find that a company which is registered in a particular country, acts in that country, has its office and receives dividends in that country, you may say that these facts, coupled with the registration, lead you to the conclusion that its residence is in that country."

The learned judge said further (2): "There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives. I adopt Mr. Matthews' suggestion that 16 & 17 Vict. c. 34, when it speaks of 'residing,' does not mean an artificial residence. It means an actual residence. Mr. Matthews argues, therefore, that when you deal with a trading corporation it means the place not where the form or shadow of business, but where the real trade and business is carried on, and that definition seems to be almost conceded by all the counsel." He then refers to the expressive French term used to express the same idea. It is "le centre de l'entreprise" — "the central point of the business." I

(1) 1 Ex. D. 453. (2) 1 Ex. D. 452.

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presume the French lawyers when using this expression did not entertain the opinion that an enterprise might at the same moment have two or more different and separate "centres."

Kelly C.B. expressed himself to the same effect. (1) He said: "Then arises the question, what is the meaning of the word 'residing,' as applied to a joint stock company, and to this case? The answer is—whether there may or may not be more than one place at which a joint stock company can reside, I express no opinion at present—a joint stock company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it, are held, and where its governing body meets in bodily presence for the purposes of the company, and exercises the powers conferred upon it by statute and by the articles of association."

From the report of the *De Beers* case in Court of Appeal (2), it appears that the company was, on March 13, 1888, registered with limited liability in the Deeds Office in Griqualand West in the colony of the Cape of Good Hope. It was also, on September 30 following, registered as an incorporated company in the same colony. Mr. Cohen, when supporting the appeal in this House, contended, as did Sir John Holker in the cases of the *Cesena Sulphur Co.* and the *Calcutta Jute Mills* (3), that a corporation's only place of residence was the place of its incorporation. Lord Loreburn, in delivering judgment, dealt with this contention thus: "Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. . . . . I cannot adopt Mr. Cohen's contention." And he then proceeds to lay down the test I have already mentioned—namely, that the residence of the company is where its real business is carried on, i.e., "where the central management and control actually abides." The Commissioners had found (1.) that the trade or business of the appellant company constituted one trade or business,

(1) 1 Ex. D. 445.

(2) [1905] 2 K. B. 612; [1906] A. C. 455, 458.

(3) 1 Ex. D. 428.

and was carried on and exercised within the United Kingdom, i.e., at their London office; (2.) that the head and seat and directing power of the affairs of the company were at its office in London, whence the chief operations of the company, both in the United Kingdom and elsewhere, were, in fact, managed, controlled and directed. It was held accordingly, on these facts, that the company had, in accordance with the test laid down by Lord Loreburn, its residence, for the purposes of the Income Tax Acts, within the United Kingdom, and it was accordingly held liable to be assessed as it had been. These three cases, in two of which the companies dealt with were foreign companies and in one British, are all dealt with in precisely the same way, and on the same principles. There is not a suggestion, that I can find, in any case decided subsequently to the year 1906, that there is any difference as to the test to be applied to foreign companies as distinguished from English companies upon this question of residence. Of course, the same company may carry on two entirely separate and independent business enterprises. It may own, run and control a tramway enterprise in one country or place, and carry on, manage and control the business of patent medicine manufacturers in another, and of cotton spinners in a third. If these enterprises are really separate enterprises, independent of one another, then the test laid down by Lord Loreburn would apply to fix the separate residence of each of them for the purpose of the Income Tax Acts. In the course of the argument in several of the cases referred to, if not in this case, it was urged that there was no reason why a company, only carrying on one trade or business, should not be able to have two or more seats of control of that trade or business and, therefore, two or more residences; but no clear suggestion was made as to how these several residences of a single business were to be acquired. It cannot be held to be by registration alone without overruling the *De Beers* case (1) and the many cases which have followed and supported it. Registration must be supplemented by the carrying on and control of the business. It cannot be

(1) [1906] A. C. 455.

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of the *real* or the whole and entire business of the company, for then all the other residences of the company would be left empty or derelict. There cannot be, it would appear to me, two systems of central management and control of one entire business situated in two distinct and separated places. Then if it only be a portion or fragment of the real business of the company which need be carried on in each residence, one may ask in vain, as I did during the progress of this case, how is that fragment to be ascertained? It appears to me to involve a contradiction in terms. What is to be its amount, what proportion of the whole? How are the several centres de l'entreprise to be fixed, their situation determined? The latter part of para. 17 of the case stated runs as follows: "The appellant company was incorporated under the Companies Acts in December, 1870, and its registered office is situate in London. It is, in our opinion, resident in the United Kingdom in the same sense as that in which the Egyptian Hotels Company, Ld., was admitted to be so resident. On the other hand, we are satisfied that the real control and management of the appellant company has been since October, 1920, and now is in Sweden. We have carefully considered all the authorities on the question of residence in the case of companies. It is to be noticed that in laying down that the place of control is to be taken as the sole test for determining the place of residence of companies for income tax purposes, the Courts were dealing with foreign companies and considering liability under Case I. In our opinion this doctrine must be confined to cases where the facts are similar. The *Egyptian Hotels, Ld.* v. *Mitchell* (1) appears to us to be a clear authority in support of the assessments under appeal; see especially Lord Sumner's opinion: 'where a resident in the United Kingdom is proprietor of a profit-earning business wholly situate and carried on abroad he is chargeable to income tax under Case V. of Schedule D if he takes no part in earning those profits, and, if he takes any part, is chargeable under Case I. This is true whether the proprietor is a natural or an incorporated person.' We, therefore, hold that the

(1) 6 Tax Cas. 550; [1915] A. C. 1022, 1039.

appellant company is 'a person residing in the United Kingdom' and assessable under Case V., Schedule D."

If by this opinion the Commissioners meant to say that the principle embodied in the judgment of the House in the *De Beers* case (1) did not apply to companies incorporated in Great Britain, but did apply to those incorporated elsewhere, their opinion is grotesquely unsound. In the case of *Calcutta Jute Mills Co.* v. *Nicholson* (2) the company was a purely English company incorporated in England under the Companies Acts of 1862 and 1867, but not elsewhere. In the other case reported in the same report the company was incorporated first under the same Acts and afterwards registered in Italy. The decision of this House on the *De Beers* case (1) was founded on the decision of Kelly C.B. and Huddleston B. in these two cases. These two learned judges treat them both in precisely the same way, and do not in any way suggest that the principles which they lay down for determining the residence of a company do not apply equally to foreign and British companies.

In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (3), the appellant company was an English company registered under the Joint Stock Companies Act, but its business was the making, maintaining, managing and working a certain railway in Brazil. The very same principles were applied to it as were adopted in the *De Beers* case (1) in order to determine whether the company resided in London or Brazil. It was decided that it resided in London, because, as the Commissioners found, the control and direction of it was in London, and its business was carried on in London under the direction of its directors. When that was decided the only question which remained for consideration was whether it was taxed on all its gains and profits under the First Case of Sch. D of the Income Tax Acts, or on only such portion of those gains and profits as were transmitted to this country under the Fifth Case of that Schedule. It was decided that it was assessable under the First Case.

(1) [1906] A. C. 455. (2) 1 Ex. D. 428.
(3) [1896] A. C. 31.

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The view which Rowlatt J. took of the performance of the Commissioners in this case is more accurate than flattering. He said: "Therefore, upon the facts, I think that the decision of the Commissioners is right, and the only misgiving that I have had is that I am not certain that they have really addressed themselves to the facts and whether I am not finding the facts for them, because they do seem rather to have misdirected themselves in their decision with regard to an extract from a judgment of Lord Sumner, and they have not, I think, quite faced the question as I have dealt with it; but I do not think it is any good sending the case back to them. My view is that the findings of fact which are set out in para. 13 are enough to establish that this English company, which was born in England, has never left England, although it may also be a company in Sweden. Therefore, I think that the appeal must be dismissed with costs."

As, however, the Commissioners based their finding upon the case of the *Egyptian Hotels* v. *Mitchell* (1), it is, I think, desirable that one should closely examine the report of that case not only in this House but in the Court of Appeal.

The Court of Appeal, which dealt with that case, was composed of Cozens-Hardy M.R., as he then was, Buckley L.J., as he then was, and Channell J. From the report of the case in that Court, it appears that the company was registered in England under the Companies Acts of 1862 to 1893. It was what is styled an English company. At a meeting of the Commissioners for general purposes of the Income Tax Acts for the City of London, it was assessed to income tax on a sum of 43,332*l.* under Sch. D, Case I. This assessment was ultimately confirmed by the General Commissioners. On appeal to Horridge J. the assessment was affirmed. The facts are stated with accuracy and sufficient fullness in the headnote of the case as reported in the Court of Appeal. It is there set forth that the company had carried on in Egypt their hotel business till the year 1908. That in that year by certain resolutions they had altered their articles of

(1) [1914] 3 K. B. 118; [1915] A. C. 1022.

association. That these resolutions provided that all the company's affairs and business in Egypt should be carried on and managed by a local board to the exclusion of any board of directors other than the local board. That the local board were to meet only in Egypt, and were to be affected only by resolutions of general meetings held in Egypt, and were to exercise all the powers of the company requisite for the Egyptian business. They were to retain the profits in Egypt and remit only to England what might be necessary to pay the dividends of the shareholders resident there, and to meet the expenses of the local board. The London Board was to keep accounts, recommend dividends and control the capital. The only business carried on in Egypt was the hotel business. The resolutions had been strictly acted upon from the date of their confirmation. No question as to the residence of the company was raised at all for decision in the case. It was, on the contrary, expressly admitted (1) that the company resided in England. The company contended, on the authority of *Colquhoun* v. *Brooks* (2) and the *San Paulo* case (3), that they never carried on the business in connection with their hotels wholly or partly in the United Kingdom. The Commissioners, purporting to found themselves entirely on the *De Beers* case (4), held that the head, seat and controlling power of the company remained in England with the board of directors, and were of opinion on the facts that the assessment was duly and properly made. The Master of the Rolls, in delivering judgment, said (5): "This is an appeal from a decision of Horridge J. which raises a question whether, within the meaning of the Income Tax Acts, the company, which is an English company and resident in London, with registered offices here, is chargeable in respect of annual profits arising from carrying on a trade. . . . . The company at one time admittedly were carrying on a business in London, not because the hotels, which are their only assets, were in the United Kingdom, for they were in Egypt,

(1) [1914] 3 K. B. 127.
(2) (1889) 14 App. Cas. 493.
(3) [1896] A. C. 31.
(4) [1906] A. C. 455.
(5) [1914] 3 K. B. 130, 132, 134.

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but because the control of the company was in the hands of the London board of directors. The brain and management and control were here, and the authorities have plainly settled that if you find that, it does not in the least matter where the actual selling of the goods and buying of the goods takes place." He then refers to the change in the articles in August, 1908, entrusting the Egyptian Board with the exclusive management and control of the Egyptian business, and says that after that the London Board controlled no part of the trade which was in Egypt.

Buckley L.J., as he then was, commences his judgment by saying: "This company is incorporated in the United Kingdom; it is therefore resident here." There must be some mistake in the report of this statement, since incorporation does not necessarily imply residence. If he had said, "This company is incorporated in the United Kingdom, and is admitted to be resident there," it would have been quite correct. He then proceeds, "The question to be answered is does this company carry on or exercise a trade in the United Kingdom? In my opinion it does not." He then states that down to 1908 it was exercising a trade in the sense that it was controlling the trade from here (London), managing from here but not after that date. Channell J. concurs and says: "I think the case may be put very shortly. It is obvious that the spending of the profits, if any, of a business is not a carrying on of the business, nor is any other way of dealing with the profits, other than spending them, any more a mode of carrying on the business. The matters relied upon by the respondent are merely powers to deal with the profits of the business." The appeal was accordingly allowed.

The company appealed to the House of Lords. (1) The noble Lords who heard it were Earl Loreburn, Lords Parker of Waddington, Parmoor and Sumner. Lords Parker and Sumner held that the division of profits formed no part of the profit-earning business of the company and that the company's business was wholly carried on abroad, that consequently the company was assessable to income tax

(1) [1915] A. C. 1022, 1036, 1037, 1039.

under the Fifth Case of Sch. D in respect only of the portion of its profits remitted to this country. Lords Loreburn and Parmoor held that there was evidence to support the finding of the Commissioners, that the company was assessable under the First Case of Sch. D in respect of the whole of their profits. The consequence of that division of opinion was that the decision of the Court of Appeal was affirmed and now stands as a decision of this House.

Lord Parker, in delivering judgment, said: "The effect of the decision of this House in *Colquhoun* v. *Brooks* (1) may be stated as follows: Where a person resident in the United Kingdom is interested in a trade or business wholly carried on abroad, such trade or business for the purposes of the Income Tax Acts falls under the head of 'Possessions in any part of Her Majesty's Dominions out of Great Britain or Foreign Possessions,' within the meaning of case 5 of Sch. D, and accordingly no part of the profits or gains of such trade or business is assessable to tax under Sched. D, unless and until it be transmitted to and received in the United Kingdom. Where, however, the trade or business is carried on wholly or in part within the United Kingdom, the profits and gains thereof are assessable to tax under case 1 of the schedule." Lord Parker, lower down, proceeded to add the following words: "My Lords, in considering whether the principle of *Colquhoun* v. *Brooks* (1) applies to any particular circumstances, it is also necessary to bear in mind your Lordships' decision in the case of *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (2) to the effect that a trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and managers resident abroad. Where the brain which controls the operations from which the profits and gains arise is in this country the trade or business is, at any rate partly, carried on in this country." He then proceeds to deal with the facts of the case.

Lord Sumner said: "Where a resident in the United

(1) 14 App. Cas. 493. (2) [1896] A. C. 31.

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Kingdom is proprietor of a profit-earning business wholly situate and carried on abroad, he is chargeable to income tax under case 5 of Sched. D if he takes no part in earning those profits." (That is really what was decided in *Colquhoun* v. *Brooks*. (1)) Lord Sumner then proceeds: "And, if he takes any part, is chargeable under case 1. This is true whether the proprietor is a natural or an incorporated person; whether he takes part in earning the profits in his own person or only by agents or servants. The question is whether the profits are wholly or partly earned from a business wholly or partly carried on in the United Kingdom. If he takes a part at home in earning the profits, its importance relatively to that taken by the agents abroad does not matter, nor does the liability to be charged under case 1 depend on active interference. Control exercised here over business operations abroad, though they are far greater in volume or magnitude, will suffice for case 1: *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter*." (2) I think these two judgments are in perfect accord. There is not any difference in their meaning or substance. The question dealt with by both of the noble Lords was whether the profits and gains earned by the hotel business of the company were assessable under Case I. of Sch. D or Case V. of that Schedule, and not at all the question as to where was the residence of that company, or whether it was situate in London or Egypt. I utterly fail to see how any persons with the faintest knowledge of the subject could come to the conclusion that either of these judgments dealt with the question as to whether the Swedish Central Railway Company had two residences or one. On the whole, therefore, I am of opinion that the decision appealed from is inconsistent with all the authorities which have in this country dealt with this question of the residence of companies for the last forty-eight years and is, therefore, erroneous and should be reversed. It may well be that the usual consequences which Atkin L.J. alludes to in his judgment will follow from a decision that a company may have multiple residences. It appears to me to be not improbable. There are no materials available

(1) 14 App. Cas. 493. (2) [1896] A. C. 31.

upon which one can form a definite opinion on this point, as I have already said. With the rest of his judgment I, however, thoroughly concur.

LORD SUMNER. My Lords, I concur in the motion about to be proposed from the Woolsack.

LORD BUCKMASTER. My Lords, according to the principles enunciated in *De Beers Consolidated Mines* v. *Howe* (1) and *New Zealand Shipping Co.* v. *Thew* (2), the appellants contend that they would be held to reside in Sweden and therefore cannot be resident here. That argument, in my opinion, is open to serious criticism.

The levying of taxation is essentially a matter of domestic jurisdiction. A company may do such acts within the jurisdiction of this country as causes it to be liable here as resident to income tax without excluding the possibility that it may also be held to be resident in another jurisdiction for the same or another purpose.

In principle both the cases quoted show only liability in the circumstances to taxation here, and the statement in *New Zealand Shipping Co.* v. *Thew* (2), that for purposes of determining residence "the registered office is only an incident in the evidence," would have left the Courts in New Zealand full discretion, if they thought fit, to declare that in their jurisdiction the place of incorporation of a company or its registered office was the sole test.

The statements in that case must be related to its facts. The phrase "real residence," to which Warrington and Atkin L.JJ. call attention, means no more than this: that the actual residence was here as determined by the principles enunciated. For purposes of our income tax the real and not a merely nominal residence was here, and if there were also residence elsewhere that did not displace it. The reference to the registered office is important; it is, to my mind, one of the critical facts in determination of residence in this country, but not necessarily the sole and exclusive fact. It

(1) [1906] A. C. 455. (2) 8 Tax Cas. 208.

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varies in consequence in every instance. Nor, even if it were the sole fact, would it follow that a company incorporated and with a registered office elsewhere could not also be resident here for purposes of income tax.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 13, 1925.

Solicitors for the appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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SWIFT AND COMPANY . . . . . APPELLANTS;

AND

BOARD OF TRADE . . . . . RESPONDENTS.

Emergency Legislation—Requisition of Food—Compensation—Maximum Controlled Prices—Interest—Defence of the Realm Regulations, reg. 2 F.

By reg. 2 F of the Defence of the Realm Regulations the Food Controller was authorized to make orders regulating the sale or purchase of any article for the purpose of maintaining the food supply of the country and to requisition any article or any stocks thereof; and, in default of agreement, the compensation to be paid for any article or stock so requisitioned was to be determined by arbitration; "but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

By an Order of August 6, 1919, the Food Controller prescribed maximum prices for the sale by wholesale or retail of bacon, ham and lard, and by an Order of August 8 the Food Controller required every owner of any bacon, ham or lard which might thereafter be discharged from ship in England to place the same at his disposal.

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

Under this order large stocks of bacon, ham and lard belonging to a firm in the United States were, on arrival in this country, placed at the disposal of the Food Controller, and the question of compensation was referred to arbitration:—

Held, (1.) (by Viscount Cave L.C., Lord Dunedin, Lord Sumner and Lord Buckmaster; Lord Atkinson dissenting) that the regulation did not authorize the arbitrator to award cost of production with an allowance of profit where the result would be to give the claimants more than they could have legally realized by an actual sale, and that the duty of the arbitrator was to ascertain what, if not requisitioned, the goods would have produced to the claimants under all the conditions which existed at the time when they would have been sold, including the maximum controlled prices; (2.) that the arbitrator was not entitled to allow interest from a date anterior to the final award.

Order of the Court of Appeal affirmed with a variation.

APPEAL from an order of the Court of Appeal, whereby certain directions were given on points of law raised by an interim award of Mr. A. T. Miller K.C.

The following statement is taken from the opinion of the Lord Chancellor:—

"My Lords, this appeal raises important questions as to the measure of compensation to be paid for stocks of bacon, ham and lard requisitioned by the British Government in the months of August and September, 1919.

During the Great War and for some time after the Armistice of November, 1918, the supply and prices of food products in this country were a source of anxiety to the Government. Under an Act passed in the year 1916, a Food Controller was appointed; and on January 10, 1917, a regulation (No. 2 F) was made under the Defence of the Realm Acts, which gave rise to the present dispute. By para. (1.) of this regulation the Food Controller was authorized to make orders regulating (among other things) the sale or purchase of any article (including orders providing for the fixing of maximum and minimum prices) where it appeared to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country. Para. (2.) of the regulation authorized him for the like purpose by order to require all or any persons owning or having power to sell or dispose of any article or any stocks thereof to place at the disposal of the

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Controller the article or the whole or any part of the stocks thereof, as might be directed by the Controller; and to this paragraph the following provision was added:—

'Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time.'

Under this regulation various orders were made relating to the importation and sale of bacon, ham and lard; but by an Order made in March, 1919, control of these articles was suspended, except that the maximum price on sales by retail of bacon and ham remained fixed at 2*s.* 4*d.* per lb. At the same time a warning was given that, if the selling price of these goods should rise above the then existing level, control would be reimposed. After the date last mentioned the prices charged by the packers to wholesalers and by the wholesalers to retailers for hog products increased, and in July, 1919, the Food Controller found it necessary to increase the maximum retail price of bacon and ham to 2*s.* 6*d.* per lb. This increase was followed by a further increase in the wholesale prices of these articles, and thereupon the Food Controller determined to reimpose control of wholesale as well as of retail prices, and also (in order to prevent stocks being held up) to use the powers conferred upon him by the regulation by requisitioning the stocks of bacon, ham and lard in and on their way to this country. The steps taken for requisitioning stocks then in this country need not be described; but as to stocks in course of being imported, the material Orders were as follows:—

By the Imported Bacon, Ham and Lard (Prices) Order, 1919 (No. 977), which was made under para. (1.) of reg. 2 F and was dated August 6, 1919, the Food Controller prescribed maximum prices for the sale by wholesale or retail of

imported bacon, ham and lard. Clause 13 of this Order was as follows :—

'This Order shall come into force on the 11th August, 1919, except that on the occasion of a sale by wholesale (not being a sale by an approved agent selling on account of the Food Controller) of any imported bacon, ham or lard which has not been imported on account of the Food Controller and has not been requisitioned by or under the authority of the Food Controller, this Order shall not apply until the 1st September, 1919.'

By the Imported Bacon, Ham and Lard (Requisition) Order, 1919 (No. 976), which was made under para. (2.) of reg. 2 F and was dated August 8, 1919, the Food Controller required every person owning or having power to dispose of any bacon, ham or lard which might be discharged from ship in Great Britain after August 9, 1919, to place the same at the disposal of the Food Controller, and deliver the same to him or to his order. The Order provided that the arbitrator to determine in default of agreement the compensation to be paid for bacon, ham or lard so requisitioned should be appointed, as to stocks discharged from ship in England or Wales by the Lord Chancellor, and as to stocks discharged from ship in Scotland by the Lord President of the Court of Session.

Notice of these orders was given to the persons concerned on August 9, 1919. The Requisition Order was determined on September 21, 1919, but the control of prices continued until the month of March, 1921.

At the date when the above Orders were made the appellants, Messrs. Swift & Co., who are one of the largest meat-packing firms in the United States, had consigned to their agents in the United Kingdom, Messrs. H. A. Lane & Co., Ld., large stocks of bacon, ham and lard for sale in this country; and these stocks, on being discharged from ship, came under the operation of the Requisition Order and were placed at the disposal of the Food Controller, who duly disposed of them through his nominated agents and wholesalers to retailers of those articles. No point now

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arises as to the machinery adopted for distribution, but of course the maximum sale prices fixed by the Prices Order were observed. Payments on account of compensation amounting to 2,110,651*l.* were made to the appellants on the understanding that the compensation would be subsequently settled by agreement or arbitration; but as to the appellants' further claims, amounting to 616,942*l.* 1*s.* 9*d.*, no agreement was arrived at, and it was necessary to proceed to arbitration. The Lord Chancellor and the Lord President concurred in appointing Mr. A. T. Miller K.C. as the arbitrator to determine the compensation to be paid to the appellants for their consignments of bacon, ham or lard, whether landed in England or Wales or in Scotland; and the arbitrator, after hearing evidence and arguments, made an interim award dated the 8th August, 1923.

In this interim award the arbitrator stated that the particulars of the appellants' claim comprised hundreds of items, and that the parties had desired him to deal in the first instance with the questions of principle in dispute between them, in the hope and belief that when these had been settled the necessary adjustment of figures might be arrived at by agreement. He further stated that he had been desired by the parties to state in an interim award the conclusions at which he had arrived, and that the Board of Trade desired him to state his decision in such a form that the judgment of the Court of Appeal might be obtained under s. 2 of the Indemnity Act, 1920, upon any point of law involved. After referring to the facts of the case and to the contentions of the parties, he found as facts :—

'(1.) That if the boxed meats had not been requisitioned, and if there had been no recontrol of prices in August, the claimants would have realized for the boxed meats a sum much less than the amount alleged by them to have been the cost of production.

'(2.) That it was not possible for him to ascertain or to form any reliable estimate of the amount the claimants would in fact have obtained for their goods (either boxed meats or lard) if there had been no requisition or recontrol, but he was

satisfied that they would not have realized more than the average prices obtained in this country for similar goods of the claimants during the three weeks immediately preceding August 9, 1919.'

He then expressed his inability to accept the figures put forward by the claimants as to cost of production, and proceeded as follows :—

'I hold that it is my duty to fix a fair and reasonable compensation in the circumstances, having regard to the cost of production of the requisitioned goods and to the allowance of a reasonable profit thereon, not to the exclusion of any other consideration but in conjunction with the other circumstances of the case and in particular those findings I have numbered (1.) and (2.) above.

'Apart from the question as to what deduction is to be made by reason of the fact that some of the goods were out of condition when requisitioned, the broad conclusion at which I have arrived is that the fair and reasonable compensation to the claimants for the bacon, ham and lard comprised in the claim would be a sum calculated, as to each type and class of goods comprised in the claim, on the basis of the average prices realized in this country by the claimants' agents during the three weeks immediately preceding August 9, 1919, for similar goods of the claimants in good condition.'

The arbitrator proceeded to deal with the question as to the deduction to be made by reason of the fact that some of the goods were out of condition when requisitioned, upon which point no question now arises ; and he then dealt with the question of interest as follows :—

'The next question is whether interest can and should be allowed to the claimants. The Attorney-General, for the Board of Trade, contends that I must assess the fair compensation at the date the goods were requisitioned, and that I have no jurisdiction to award any interest. If this be so, I shall much regret it. I observe, however, that reg. 2 F prescribes that "Such compensation shall be paid as may be determined," etc. I hold that my duty is to fix the compensation "to be paid," and that in fixing the amount I am entitled

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to have regard not only to the date of the requisition but also to the date of payment. I also consider that I have a discretion in the matter. I hold that an amount arrived at in accordance with the decisions hereinbefore stated would not in itself be a fair and full compensation, and I decide that in order to arrive at the final figure of such compensation a sum should be added to the said amount equal to an allowance of interest thereon at 5 per cent. per annum calculated from October 1, 1919, until payment.'

Against this interim award the Board of Trade appealed under the Indemnity Act, 1920, to the Court of Appeal, and by the notice of appeal raised a number of points of law, of which the following only need now be mentioned :—

'1. That the learned arbitrator was wrong in assuming that the claimants are entitled to compensation for the reimposition of control of prices and distribution as well as for the requisitioning of their goods.

'2. That the learned arbitrator was wrong in taking as the basis of compensation prices higher than the maximum prices fixed by the Order of August 6, 1919.

'10. That the learned arbitrator was wrong in holding that he ought to allow interest for delay in payment.'

The claimants (the present appellants) also gave notice of appeal, but this appeal was not pressed and need not be further referred to.

Upon the appeal by the Board of Trade the Court of Appeal (consisting of Bankes, Scrutton and Sargant L.JJ.) made an order declaring (1.) that the arbitrator was wrong in taking as the basis of compensation prices higher than the maximum prices fixed by the Order of August 6, 1919, and (2.) that the arbitrator was wrong in holding that he had jurisdiction to allow interest. As to the first of these points, Bankes L.J., in the course of his judgment, pointed out that while it was not definitely stated in the interim award that the prices allowed by the arbitrator were in excess of those scheduled in the Maximum Prices Order, it seemed very probable that they were in excess of those prices; and he expressed the opinion that to give the claimants for the requisitioned goods

an amount arrived at by taking into consideration prices higher than those which could possibly have been realized for those goods, was not an awarding of compensation but the making of a present. Scrutton L.J., in dealing with the same point, observed that he could not see in the regulation any intention to give a claimant more than he had lost by awarding him either (1.) cost of production when in excess of the price he could obtain by sale, or (2.) market price before control, when, in fact, owing to control he could only obtain less. Sargant L.J. referred to the direction contained in the latter part of para. (2.) of reg. 2 F, that in determining the amount of the compensation the arbitrator should 'have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time,' and expressed the opinion that this direction was directed primarily to preventing the claimant getting more than the cost of production and a reasonable profit by reason of an unreasonably enhanced market price, not to insuring that he should be guaranteed his expenditure plus a reasonable profit notwithstanding an unduly depressed market price. He saw no answer to the argument that in all cases where prices were controlled the maximum prices chargeable under such control must necessarily and inevitably form a superior limit within which such compensation must be restricted; for since the claimants could not during the period of control have sold any class of goods at any price exceeding the maximum, the loss they had suffered could not, in any case, exceed the profit they would have made on the basis of sale at the maximum price allowed. On the second question, relating to the allowance of interest, Bankes and Sargant L.JJ. relied on the rule as established by a number of cases, including the decision of this House in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1), and held that as there was no debt or sum payable at a certain time, and indeed no certain sum payable at all until the conclusion of the arbitration, no interest could be allowed; but on this

(1) [1893] A. C. 429.

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point Scrutton L.J. dissented, and held that, except so far as the delay in ascertaining compensation might be attributable to unreasonable action on the part of the claimants in the nature of their claim or the time at which it was made, interest on the value of the goods requisitioned might properly be included in the compensation. Leave was given to the claimants to appeal to this House."

1925. Feb. 6, 9, 10. *Sir John Simon K.C.* and *Raeburn K.C.* (with them *Darby* and *Alchin*) for the appellants. Upon the construction of reg. 2 F the arbitrator in fixing compensation is not bound as matter of law never to give more than a sum which is equal to contemporaneous maximum prices. The Maximum Prices Order was not either in law or in fact relevant to the question of the compensation to be awarded to the appellants. Further, the arbitrator was acting within his powers when he proposed to add interest to the compensation found due.

Sir Thomas Inskip S.-G. and *Sir Patrick Hastings K.C.* (with them *W. Bowstead*) for the respondents. The appellants are entitled to compensation for the requisitioning only and not also for the consequences of control of price and distribution. The true basis is what the appellants have lost owing to their goods being requisitioned. The Maximum Prices Order was in force over the whole period during which but for the requisition the appellants would have sold their goods. An award on the basis of higher prices than the appellants could possibly have realized in the absence of requisition is an award of something more than compensation. The addition of interest from a date anterior to the final award is not included in the determination to be made under reg. 2 F of compensation for the articles requisitioned. Interest can only be awarded by virtue of statutory authority or of a contract express or implied. Until the final award there cannot be any certain sum payable to the appellants. Apart from statute interest cannot be allowed as compensation by way of damages for delay in payment.

Sir John Simon K.C. replied.

[On the question of interest the following authorities were referred to: *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1); *Birch* v. *Joy* (2); *Toronto City Corporation* v. *Toronto Railway Corporation* (3); *In re Richard and Great Western Ry. Co.* (4); *Higgins* v. *Sargent* (5); *Fletcher* v. *Lancashire and Yorkshire Ry. Co.* (6); *Caledonian Ry. Co.* v. *Carmichael* (7); *West Highland Ry. Co.* v. *Place* (8); *Seaboard Air Line Ry. Co.* v. *United States* (9); *Brooks-Scanlon Corporation* v. *United States* (10); Cripps on Compensation, 6th ed., c. 14.]

The House took time for consideration.

1925. March 17. VISCOUNT CAVE L.C. [after stating the facts]. My Lords, on the argument of the appeal three points were raised on behalf of the appellants.

First, stress was laid on the fact that the Requisition Order (No. 976) and the Prices Order (No. 977) were made so as to take effect at or about the same date, and that notice of both orders was given to traders at the same time, and indeed in one and the same envelope; and it was said that the two Orders together formed part of a single scheme, the real object and effect of the Prices Order being only to announce the prices at which the Government as the sole source of supply of the goods in question was prepared to dispose of them. The compensation must, therefore, it was argued, be ascertained as if there had been neither requisitioning nor control of prices. My Lords, I do not think that there is good ground for this suggestion. Control of retail prices existed before the date of the requisition; and the facts show that the control was extended to wholesale prices, not in order to fix the prices at which the requisitioned goods would be sold or to limit the claim for compensation, but for the sole purpose of preventing the sellers of bacon,

(1) [1893] A. C. 429.
(2) (1852) 3 H. L. C. 565.
(3) Ante, p. 177.
(4) [1905] 1 K. B. 68.
(5) (1823) 2 B. & C. 348.
(6) [1902] 1 Ch. 901.
(7) (1870) L. R. 2 H. L. Sc. 56, 61.
(8) (1894) 21 R. 576.
(9) (1923) 261 U. S. 299.
(10) (1924) 265 U. S. 106.

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ham and lard by wholesale from exacting prices which would have made it impossible for retailers to sell those articles at any profit at all. The Prices Order was not a part of or a supplement to the policy of requisition, but, on the contrary, the Requisition Order was made in order that the purpose and object of the Prices Order—which was to ensure the supply of food to the public at reasonable prices—might not be defeated by the holding up of stocks or the imposition of prohibitive wholesale prices. Further, the two orders did not cover the same ground; for control of prices applied, not only to requisitioned goods, but also to goods which were never requisitioned at all, and was continued for many months after requisition had ceased. This argument, therefore, cannot be sustained.

The second and principal argument in support of the appeal was founded on the provision contained in para. 2 of reg. 2 F, which provided that in determining the amount of the compensation the arbitrator should "have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article." It was said that these words excluded the ordinary method of ascertaining compensation by reference to the amount which the owner of requisitioned goods could have got for them in the market, and, laying down a special code according to which compensation was in this particular case to be ascertained, directed the arbitrator to have regard to cost of production and profit and not to the price which (whether by reason of the limitation of prices or otherwise) could have been obtained on the market if there had been no requisition. My Lords, in my opinion this argument proceeds on a misconception as to the meaning of the words quoted from the regulation. The ruling principle laid down by the regulation is that the owner of any requisitioned article shall have "compensation" for that article, that is to say a sum which will be the equivalent of and will balance the thing which has been taken from him. To construe the regulation as meaning that the owner is to have a sum equal to cost of production plus a reasonable profit without regard

to what he could have got for the goods in the market if they had not been requisitioned is to give him more than he could have obtained had there been no requisition at all; and this cannot be the meaning of the clause. I think that the true construction of the words quoted is that which was put upon them by Sargant L.J., that is to say, that the words are limiting words and are intended to prevent a trader from receiving by way of compensation more than a reasonable profit upon his venture, even though owing to war conditions the market prices may have risen to a very high level. In any case I find it difficult to understand how the arbitrator can have been right in proposing to base his award upon the prices ruling before the goods were requisitioned and at a time when they could not possibly have been sold. His duty was to ascertain what, if not requisitioned, they would have produced to the owner under all the conditions which existed at the time when they would have been sold; and among these conditions would have been the existence of the statutory maximum prices.

Attention has been called by one of your Lordships to the fact that under the First Schedule to the Prices Order different maximum prices are fixed according as the goods there described are sold to a wholesaler nominated by the Food Controller or to some other person; and it is suggested that it would be absurd and inequitable to apply that distinction in fixing the compensation to be paid to the packers. I think the answer is that the First Schedule applies only to sales by approved agents on account of the Food Controller, and has no bearing on the question as to the prices which the packers or their agents could have realized if the Requisition Order had not been made. The maximum prices which for that purpose have to be taken into account are those fixed by the Second Schedule to the Order.

The result is that upon this point I agree in substance with the decision of the Court of Appeal; but I think that the form of declaration made by that Court requires consideration. It was pointed out by counsel for the appellants that, if the goods in question had not been requisitioned, they

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might conceivably have been reshipped and sold abroad at prices above the maximum prices fixed by the Prices Order; and although it may well be that the arbitrator did not consider this course commercially possible, the point should be left open for him to deal with. Further, if there had been no requisition, some of the goods might possibly have been sold free from any restriction as to wholesale prices during the currency of para. 13 of the Prices Order; and the first declaration made by the Court of Appeal might be read as preventing the arbitrator from taking this contingency into consideration. For these reasons I am of opinion that the first declaration should be varied by substituting for it a declaration that the arbitrator was wrong in determining the compensation without regard to the provisions of the Order of August 6, 1919.

Upon the question of interest I am of opinion that the view taken by the majority of the Court of Appeal is right. It is true that on a contract for the sale and purchase of land it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase money from the date when he took, or might safely have taken, possession of the land: see *Birch* v. *Joy* (1); but this practice rests upon the view that the act of taking possession is an implied agreement to pay interest: per Sir W. Grant in *Fludyer* v. *Cocker*. (2) It is true also that the rule has been extended to cases of compulsory purchase under the Lands Clauses Consolidation Act, 1845: *In re Pigott and Great Western Ry. Co.* (3); *Fletcher* v. *Lancashire and Yorkshire Ry. Co.* (4); but this is because the notice to treat under the statute is treated in equity as creating the relation of vendor and purchaser. No doubt the rule is well established in the case of sales of land; but there is no authority in English law for applying it to a requisition of goods by the State, and there appears to be no sufficient reason why in such a case the provisions of Lord Tenterden's Act should not apply. The right of the owner of goods requisitioned under reg. 2 F is

(1) 3 H. L. C. 565.
(2) (1805) 12 Ves. 25, 27.
(3) (1881) 18 Ch. D. 146.
(4) [1902] 1 Ch. 901.

to have compensation for the goods determined by arbitration and paid, and until the amount of the compensation has been so determined there is no sum certain payable to the owner upon which interest can run. To hold otherwise is to give compensation, not for the goods themselves, but for the time occupied in ascertaining their value in accordance with the law. The decisions in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1) and *In re Richard and Great Western Ry. Co.* (2) are in point.

For these reasons I am of opinion that the order of the Court of Appeal should be varied by substituting for the first declaration contained in that order a declaration in the form above set out, but in other respects should be affirmed. As this appeal has resulted in a modification of the order of the Court of Appeal, I think that the parties should bear their own costs of the appeal to this House.

LORD BUCKMASTER. My Lords, I have had the opportunity of previously reading the judgment of the noble and learned Lord Chancellor, and with it I entirely agree.

LORD ATKINSON. My Lords, this is a very peculiar case. The principle contended for on the part of the Crown, stripped of all sophistries, amounts in my view in effect to this—that the Crown, acting through one of its officers, has a right to requisition the property of a friendly alien, and then by the provisions of several orders and regulations made for the defence of the realm enact that the compensation which this alien shall receive for the loss of this very property shall never exceed the sum it would have amounted to if it had been based upon certain maximum prices fixed by orders dealing with entirely different transactions—namely, with the sales by the Crown through this officer of the property so requisitioned, so that the Crown would not sustain any loss, or to put it more shortly, the contention on behalf of the Crown is that its officer is entitled to acquire property compulsorily, and compensate the owner for the loss he sustains

(1) [1893] A. C. 429. (2) [1905] 1 K. B. 68.

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by being deprived of it on the basis of maximum prices, fixed by the Crown itself, at which its officer could sell this property, even though the amount so calculated should be less than the cost of production of the requisitioned goods. Thus the captor of the property himself fixes the limit of the sum he is to pay for it. The prices so fixed are called controlled prices, and the contention of the Crown, as I understand it, is that it would be illegal for an arbitrator dealing with the matter to award to the alien owner as compensation a sum in excess of an amount calculated upon the maximum control prices.

To compensate is defined in Murray's Dictionary to be (1.) to make an equal return ; (2.) to compensate or remunerate a person.

I have always understood that, since *Stebbing* v. *Metropolitan Board of Works* (1) was decided in the year 1870 downward, the principle upon which compensation should be assessed where lands are acquired compulsorily under the Lands Clauses Consolidation Act was, to use the words of Lush J., this : that " the question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him." I do not see any reason why the same principle should not equally apply to the compulsory acquisition of chattels.

In the present case that principle would appear to be, to a great extent, reversed. The person who loses the property, whatever its value, is to receive as compensation a sum calculated upon the maximum prices for which the requisitioner can sell it. In *In re Lucas and Chesterfield Gas and Water Board* (2) Fletcher Moulton L.J. laid down the law as to compensation for land compulsorily taken in these words. He said : " The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount,

(1) (1870) L. R. 6 Q. B. 37, 45. (2) [1909] 1 K. B. 16, 29.

but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers."

That statement of the law has been many times approved of in this House : see *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1) ; *Fraser* v. *City of Fraserville.* (2)

The goods, the subject matter of this suit, are bacon, ham and lard. They were discharged in this country from the ship that carried them on August 9, 1919, on which day they were requisitioned by the Food Controller, acting on behalf of the Crown. The trade with which the case deals was under control up to the month of February, 1919. It was at that date determined by the parties interested to decontrol the prices of goods of this class, and accordingly, on February 26, 1919, a circular letter was addressed by the Department of the Ministry of Food, acting on behalf of the Government, stating that the free importation of bacon, ham and lard would be permitted from March 10, 1919, and from March 31, 1919, for the sale wholesale of imported goods of this class, liberty being reserved to the Food Controller to reimpose control if the selling price of such goods to the consumer should rise above the then existing level, or adequate supplies should not be forthcoming.

In the result, the Food Ministry, on August 9, 1919, reimposed the control. The arbitrator finds in his award that, after this date of August 9, 1919, all bacon, ham and lard then unsold by the packer's agents, or discharged after that date from the ship which carried them, were, by Order No. 976 of 1919, requisitioned by the Food Controller. In my view, the Orders made by the Food Controller which have been relied upon by the Crown in this appeal, whether taken singly or together, do not compel the arbitrator, as a matter of law, to fix the compensation the appellants are entitled to receive

(1) [1914] A. C. 569, 576. (2) [1917] A. C. 187, 194.

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for the goods of which they had been deprived at a sum not in excess of what it would have amounted to had it been based upon these maximum control prices.

Under these circumstances, I think I am bound to examine in some detail the four Orders dealing with the matters which are the subject of this suit, with a view to show that these maximum control prices are not designed or intended to form the bases on which compensation to the owner of goods like those which have been requisitioned are to be calculated. These prices apply to wholly different transactions—namely, to the sales effected by the agents of the Food Controller of the goods of which he has possessed himself by requisition or otherwise, not to sales by the appellants, who had nothing to sell. They also deal with and impose a maximum limit upon sale by persons other than the Controller. Owners such as the appellants have no hand in, or influence over, the fixing of these prices. They might be so low as to inflict a serious loss on the owner of the requisitioned goods.

The first of the above mentioned Orders is the Imported Bacon, Ham, Lard (Requisition) Order, 1919, No. 976. After providing that any person owning or having power to dispose of any bacon, ham or lard which may be discharged from a ship in Great Britain after August 9, 1919, shall place the same at the disposal of the Food Controller, and further providing for the appointment of arbitrators for England and Scotland respectively, it proceeds by the following clause to destroy any free market that could exist in Great Britain for the sale or purchase of goods of this class. The provision runs thus:—

"2. (*a*) Except under the authority of the Food Controller a person shall not, on or after the 9th August, 1919, either on his own behalf or on behalf of any other person—

(i.) buy, sell or deal in; or

(ii.) offer or invite an offer for or propose to buy, sell or deal in; or

(iii.) enter into negotiations for the sale or purchase of or dealing in

any bacon, ham or lard for the time being outside the United

Kingdom, whether or not the sale, purchase or dealing is or is to be effected in the United Kingdom."

This provision is apparently directed to prevent dealings with goods situate abroad or in transition to this country. It obviously destroys a free and open market in Great Britain for the goods to which it applies. The next Order to be considered is the Imported Bacon, Ham and Lard Prices Order, 1919, No. 977. It proceeds to fix the maximum prices at which imported bacon, ham and lard may be sold on the Food Controller's account by his agents and, in particular cases, sold by others. The Order sets out in four separate schedules the different kinds of sales which are dealt with. The class of sales dealt with in subhead 1 of the First Schedule are sales of bacon, ham and lard made by an approved agent of the Food Controller selling on the latter's account to an approved wholesaler. The class of sales of the same commodities dealt with in subhead 2 of this same schedule are sales by a similar agent on account of the same principal to a person other than an approved wholesaler. The maximum prices fixed for the first class of sales differ from those fixed for the second by about 5*s.* per cwt.

If the contention of the respondents was, as I certainly understood it to be, that, with a view, no doubt, to protect the Government from loss, the compensation the appellants were to receive should not exceed the gross amount at which the respondents could sell at maximum prices the goods they had requisitioned to any lawful purchaser, I adhere to the view that there is something almost absurd, and certainly unjust, in selecting as materials upon which compensation for a former owner can be measured a scale of maximum prices which differs by 5*s.* per cwt., accordingly as the purchaser is an approved wholesaler or not an approved wholesaler. Yet so it is.

The Second Schedule deals with sales not in retail and not included in the First Schedule, and the maximum prices for these sales again differ from those fixed under the First Schedule. The maximum prices fixed for sales by retail again differ from all the other maximum prices. The maximum

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prices on these sales other than for goods sold by retail are fixed at so much per cwt., but those by retail at so much per lb. To give an example I take lard. The maximum price under subhead (1.) of the First Schedule for refined lard is 198*s.* per cwt.; in subhead (2.), 200*s.* per cwt., in Sch. 2, 203*s.* per cwt., and in the Third Schedule, 2*s.* per lb., which is 224*s.* per cwt. Thus the maximum prices vary not on account of the quality of the article sold, but in some cases on the position and qualifications and distinction of the buyer. This appears to me to make these varying maximum prices wholly unsuited to be measures of the amount of compensation which an owner, deprived of his goods, is entitled to be paid for the loss of them.

By s. 11 of this Order 977, the expression "approved agent" is defined to mean an agent approved by the Food Controller under this Order, and a "nominated wholesaler" is defined to be a wholesale dealer for the time being nominated by the Food Controller under this Order.

However convenient it may be to the Food Controller that he should only pay for the goods he requisitions a sum based on the maximum prices at which he can sell those same goods, it is a scheme wholly unsuited for business purposes, absurd in itself and, in my view, unjust to the owner of the goods. The very fact, I think, that under it the owner should, in effect, get 5*s.* per cwt. less for his property if sold to an approved wholesaler than if sold to a wholesaler not approved, is the best proof that this scale was never designed or intended to form the basis upon which the owner of requisitioned goods was to be compensated for being deprived of them.

I now turn to the examination of the Defence of the Realm Regulations marked 2 B and 2 F. They are both old regulations. The first, originally published on February 15, 1916, was modified somewhat afterwards. It deals with goods required and taken by the Admiralty, Army Council, Air Council, or Minister of Munitions, and provides that the price to be paid in respect of the goods so taken shall in default of agreement be determined by the tribunal which deals

with claims for compensation under these regulations. These claims are, in the absence of any express provision to the contrary, determined in the manner it proceeds to provide. That manner is that in determining this price regard need not be had to the market price, but shall be had, if the goods are acquired from a grower or producer thereof, to the cost of production, and the rate of profit usually earned by him in respect of the same goods, and also to the consideration whether such rate of profit was reasonable or excessive, and to any other circumstances of the case.

If the goods are acquired from any person other than a grower or producer thereof, regard is to be had to the price to be paid by such person for such goods, and to whether such price was reasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the War, and to whether such rate of profit was reasonable or excessive, and to any other circumstances of the case. No allowance of profit is to be made if the person from whom the goods are requisitioned himself acquired them otherwise than in the usual course of trade. There is no clause in this Order such as that contained in the Requisition Order 976 prohibiting any sales not consented to by the Food Controller.

A proviso follows to the effect that where by these regulations or any order made thereunder the sale of goods at a price above any price fixed thereunder is prohibited, the price assessed under the regulation shall not exceed this fixed price. This is all intelligible and workable.

The Order, upon the construction of which this case is alleged to turn—namely, 2 F—was not framed on the same lines as is 2 B. The former, like the latter, is comparatively old. It was originally published in January, 1917, was added to in August in the same year by the introduction in brackets of the words "including Orders providing for the fixing of maximum and minimum prices," and one of its sections was deleted. By the first section of the Order the Food Controller is empowered to make Orders regulating or giving directions

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with respect to, amongst other things, the supply, sale or purchase or other dealing in, or measures in relation to any articles, including Orders providing for the fixing of maximum and minimum prices, where it appears to him necessary or expedient to make such Orders for the purpose of encouraging or maintaining the food supply of this country. And by the second section of the Order he is empowered for the like purposes, very much as he is empowered in the Requisition Order No. 976, to require persons owning or having power to sell or dispose of any article or any stocks thereof to place at the disposal of the Controller this article or the whole or any part thereof as may be directed by the Controller on such terms as he may direct, and to deliver to him or to any person named by him the article or stocks in such quantities and at such terms as he (the Controller) may require where it appears to him necessary or expedient to make any such order for maintaining the food supply of the country.

Then follows the clause dealing with compensation. It runs thus: "Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

It appears to me to be clear that this general regulation must be taken to be superseded by Orders No. 976 or 977 dealing with imported bacon, ham and lard, so far as these latter are inconsistent with provisions of the earlier General Order.

The foregoing passage of this General Order no doubt provides that in determining the amount of compensation the arbitrator shall have regard to the cost of production of the article, and to an allowance of reasonable profit. There are also other matters to consider, but this provision, in my

view, does not at all mean that if he does his best to ascertain what the cost of production is with a view to its aiding him in fixing the compensation, and from lack of material is unable to fix it and therefore necessarily unable to allow a reasonable profit thereon, and proceeds to calculate the amount of the compensation on some other basis, that circumstance makes his award void at law. The owner of an article or articles requisitioned would, according to that contention, not get any compensation at all for the articles or stock requisitioned, if the cost of production could not be ascertained. Again, the arbitrator may, if he should think it necessary, take into consideration the market price. He should not do this if he does not think it necessary. He can do it if he does think it necessary; but what is meant by the words " market price of the article " in this connection ? It appears to me it cannot mean the market price in the market dominated and controlled and restricted by the Food Controller which the Order No. 976 creates, but the price in an open and free market. After all, why is it that both in contracts for the sale and delivery of goods and the tortious destruction of property the market place is taken as a measure of value ? It is because it is assumed that if goods contracted to be sold and delivered are not delivered, the purchaser can go into the open market and purchase goods of the same description. If he should have to pay a higher price for them than the contract price, he can sue for the difference, and again, if the goods are rejected by the purchaser, the vendor, it is assumed, can sell them in the open market, and if he should get less for them than the contract price, he can sue the purchaser for the difference. If a man's motor car, for instance, be destroyed by the tortious act of some one, and the wrongdoer is sued by the owner for damages, the main question will be for what price can the owner obtain a car of the same kind in the open market, the price paid for which less proper deductions for age, wear and tear, would be a fair measure of his loss ?

All this, as I have said, necessarily rests upon the assumption that the market is a free and open one. If there be

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no market, the damages must be ascertained in some other way.

In the case of *In re Vic Mill* (1) Neville J. had to deal with a case where goods (machinery) were made to order for which there was no market. The purchaser refused to accept them and the vendor sued for damages for breach of contract. In giving judgment he (the learned judge) said: "It seems to me goods made to order stand on quite a different footing from other goods because they are not made for the market. . . . . Take the case of an order for an article which is perfectly useless to anybody but the person who ordered it; what is the measure of damage in that case if the contract is not fulfilled? It is not only the loss of profit, but includes the loss of the cost of the article that cannot be disposed of." In England, from the passing of the Requisition Order No. 976, there was no free or open market for the sale of imported bacon, ham or lard. A Minister of State ruled everything, and the market so controlled and dominated was therefore necessarily the market to which the Order No. 977 applied, not to a free and open market which did not exist.

There is not, in my view, any provision, express or implied, in any of these Orders to the effect that the compensation payable to the owner of requisitioned goods is under any circumstances to be based on the controlled maximum prices. In the following passages of the arbitrator's award he describes how business was done under these orders: "The general scheme was that the packers' agents were appointed to act as 'approved agents' of the Food Controller. All agents were required to make a return in a prescribed form to the Food Ministry of goods in their control affected by the requisition order. Thereafter goods were allotted to each agent for sale on behalf of the Food Controller, and as far as convenient the goods allotted were goods which the particular agent would in the absence of requisition have sold for his packer as principal. Every sale thereafter was subject to a

(1) [1913] 1 Ch. 183, 187; affirmed [1913] 1 Ch. 465.

maximum price fixed by order (977 of 1919) and all sales by approved agents were at prices fixed by the Food Controller. The prices so fixed were considerably less than the voluntary maxima prescribed by the packers' agents for themselves prior to recontrol."

The arbitrator (Appendix, pp. 1258–9) states that at the hearing the Attorney-General, representing the Board of Trade, submitted that though the arbitrator must by the terms of reg. 2 F have some regard to the cost of production of the requisitioned goods and a reasonable profit thereon, if it was clear to him from the evidence that the amount thus arrived at would exceed what the claimants could by any possibility have themselves realized for their goods had there been no interference by the Government, then the figures of cost of production and profit ceased to be of any real importance. He further states that the Board of Trade deny that the particulars of the claim showed at all the cost of production and asked him to disregard the claimants' figures on this ground.

He further finds that if the goods had not been requisitioned and that there had been no control of the prices in August, the claimants would have realized for their goods much less than the amount claimed by them to be their cost of production. He states that he cannot form any reliable estimate of what the claimants would have obtained for their goods if there had been no control, but he is satisfied they would not have realized more than the average prices obtained in Great Britain for similar goods of this class during the three weeks preceding August 9, 1919, i.e., the three weeks before control was reimposed and while the market was free and open.

He further states that he finds as a fact—and this, I think, is crucial—that the amount actually realized for the claimants' goods when sold on behalf of the Food Controller was, in the circumstances of their realization, no indication of the loss suffered by the claimants in consequence of the goods being requisitioned. He further finds that the figures put forward do not enable him to find what was the cost of production of

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the claimants' goods. He states he considers it to be his duty to fix a fair and reasonable compensation in the circumstances, having regard to the cost of production of the goods and the allowance of a reasonable profit thereon, not to the exclusion of any other consideration but in conjunction with the other circumstances of the case, and in particular with the findings by him which he has already mentioned. He then states that he has arrived at the conclusion that a fair and reasonable compensation to the claimants for their goods comprised in the claim would be a sum calculated for each type and class of goods comprised in the claim on the basis of the average prices realized in Great Britain by the claimants' agents during the three weeks immediately preceding August 9, 1919, for similar goods of the claimants in good condition. That is, in effect, on the average prices realized in this country for goods similar to those claimed for; that is, for the market value of the goods when there was a really free and open market for them, and he bases the amount awarded on these prices.

In my opinion, the fact that the amount thus awarded exceeds what would be given by an award based on the maximum control prices does not, for the reasons I have given, vitiate the award. On the question of interest, I have come to the conclusion that the present condition of the English authorities does not justify one in finding that the claimants are entitled to interest.

On the whole, I think the appeal succeeds and should be allowed.

LORD SUMNER. My Lords, both the points involved in this appeal—that of the amount of compensation and that of the allowance of interest—turn on the construction of the latter part of para. 2 of reg. 2 F. The general scheme is to authorize the Food Controller to requisition, by notice or in some similar form, all or any articles, for the purpose of maintaining the food supply, and I think it is substantially true to say of them that all are merchandise and most are perishable. The articles requisitioned thereupon become the

Food Controller's property and the former owner loses his property and rights in them without any breach of the law or power of complaint. As the transaction is in no sense a sale and is carried out without any transfer or conveyance, there is no implied agreement for the payment of a price. The former owner simply obtains under the Order the right to go to arbitration upon the question, what compensation is to be awarded to him and, when an award is made and published, and not before, to receive payment of the amount awarded.

The regulation does not define the word "compensation." It merely says that there is to be compensation for the articles requisitioned. Compensation is not given for the requisitioning of the articles itself, for the compulsory acquisition, for disadvantage arising from maximum prices or other war measures, or for the lapse of time between the original requisition and the publication of the award, and as the entire transaction is sui generis, these things must either be expressly given by the regulation or they are not given at all.

In ordinary circumstances one of the first things to which an arbitrator's mind would turn in awarding compensation for perishable merchandise requisitioned would be its market price at the date of the requisition, and, unless otherwise directed or restricted, he would be entitled to do so under the word "compensation" in this regulation itself. He is, however, otherwise specially directed in the words beginning "but determining" and ending "at the time," and, so far as and when they operate, they are limitative of the full generality of the paragraph. In my opinion, nevertheless, where the facts are such that these limitative words do not operate, full effect must still be given to the word "compensation," and in any case that word is dominant throughout.

My Lords, I think that the true construction of these limiting words is, that they give the arbitrator directions upon one subject from two opposite points of view. The first direction is positive and mandatory; he shall have regard to cost of production and reasonable profit. The other is negative but is not mandatory; he need not take into

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consideration the market price necessarily and always, that is, he may take it into consideration sometimes, when it is appropriate. Even the mandatory words only require him to have regard to and do not require, nor in my opinion do they allow, him to award cost of production with an allowance for profit where, under the dominant word "compensation" and the scheme of the regulation, it would not be legally proper to do so.

The intention of the clause is fairly simple. The current market price in the case of merchandise is obviously and normally so sound a measure for compensation that any regard to cost of production is generally irrelevant. The merchant, who has brought his merchandise to market to sell it, is fully compensated for the articles requisitioned, if he gets the net price, for which he would have sold them if he had been left to his own devices. He ought not to have more, since that would be compensation for his own want of success in trading. If, when left free, he would not have realized the full cost of production, to give him that cost would be a solatium for his miscalculations, and, if with an allowance for profit, a highly undeserved solatium, but it would not be compensation for the requisitioned article itself. Why, then, is the arbitrator to trouble himself with having regard to such matters? For the same reason that he is told, that he need not necessarily take into consideration the market price at the time, that is, at the time of requisitioning. The market price may be so divorced from the ordinary operations of supply and demand as to be, for the nonce, foreign to the idea of a judicial compensation. Thus at a time of artificial scarcity and manipulated market prices the arbitrator can resort to what may be called an economic price. He is not bound to reckon the compensation as if he was closing an account on the Stock Exchange. He is directed to have regard to the elements of cost of production and reasonable profit, in order to obtain a basis, whereon to give, as compensation, the value of the articles requisitioned at the time of requisitioning. Probably he would not be entitled to disregard the de facto market price merely because of the existence of a Maximum

Prices Order or merely because the maximum prices fixed were too low to cover cost of production and reasonable profit, but this aspect of the clause need not be considered now.

If, however, as is the case here, the arbitrator, having had regard to cost of production and reasonable profit, finds nothing to which he can give effect, partly because the evidence of the cost of production is untrustworthy, partly because he is satisfied that in no event could a profit have been made by the claimants on the sale of the merchandise, and if, further, as appears also to have been the case here, he finds that there was no market price at the time or times of the requisition upon which he can rely, what then? He has still to settle a compensation for the articles requisitioned somehow, and in doing that, as it seems to me, there are two things at least that he must not do. He must not give compensation for any form of loss except for the article requisitioned itself, and he must not put upon it for purposes of compensation a price, which it would have been illegal for the merchant to realize if left to himself.

In the present case, as I understand it, the learned arbitrator certainly has done the latter as regards the sum allowed for the articles, and the allowance of interest involves that, on some ground or other, he has also done the former. His conclusion is very tersely expressed and he does not set out the steps in his reasoning. He expressly says that the claimants' proof of their cost of production does not satisfy him, but he is satisfied that no profit would in any case have been realized, and with that he ceases to regard cost of production and profit any further. He does not deal with market prices at the time or times of requisition, or with the existence of the Maximum Prices Order, but, passing these by, he adopts, as market prices applicable, those which were ruling before any of the parcels of merchandise in question began to be landed and before any requisition was made. He uses these for the purpose of calculating an average, which, however, he applies after the requisitioning began and at all the respective times of requisitioning thereafter, although

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that average itself may never have been an actual ruling price on any date whatever. I surmise that he has considered market prices after August 9 to have been non-existent, not considering maximum controlled prices to deserve that name, and has then fixed upon these rates chiefly because he thought that they were not far off the dates of requisitioning in point of time or the cost of production in point of result. One thing, however, is clear—namely, that the Maximum Prices Order would have made it illegal for the claimants themselves to have realized these rates by actual sales, and it follows to my mind that it was an error in law for the learned arbitrator to award them as compensation, whether his error consisted in forgetting the existence of maximum prices or in thinking that, unless they constituted market prices, he was at liberty to lay them entirely out of account.

As to interest, I think the common law rules, which are now perfectly well settled, do not assist the claimants, and the law of other countries and the rules by which Courts of equity give interest in connection with purchases and sales of land, have no bearing on the present case. Unless the regulation itself authorizes the allowance of interest none can be given. Now, not only is "compensation" the word used and not "interest" but there is nothing in the regulation to attach an allowance of interest to. There is no debt, for no final award has been made; there has been no wrong done, for the requisitioning was legal and the goods became the minister's goods from the time of requisition. It is the regulation itself that prescribed arbitration, a proceeding which involves delay and causes the merchant to be out of his compensation for a substantial time, or rather postpones the date at which his compensation can be fixed and so become payable. To give interest is really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation.

My Lords, I think that in substance the order of the Court of Appeal is right, but I concur in the variations in the declaration which have been proposed. For what it may be worth, the claimants are entitled to the benefit of the learned

arbitrator's opinion on the effect of cl. 13 of the Maximum Prices' Order in exempting from its operation a portion of their merchandise between August 9 and the end of the month. I strongly surmise, from his silence and the nature of the case, that the possibility of reshipping or diverting merchandise to foreign ports and doing better there than could have been done by selling them here was not considered to be of practical importance. It involves questions of extra freight and transhipment charges, of risks of deterioration by lapse of time, of the capacity of foreign markets to absorb further supplies, of the machinery existing there for marketing the goods, of the credit of the buyers and the prices obtainable. All this, however, is for the learned arbitrator, and the claimants ought not to be shut out from having it brought before him.

My Lords, I am requested to add that my noble and learned friend Lord Dunedin agrees in the opinion I have just read.

Order of the Court of Appeal varied by substituting for the first Declaration thereof a Declaration that the arbitrator was wrong in determining the compensation without regard to the provisions of the Order of August 6, 1919, *and, subject to such variation, said order affirmed. Each party to pay their own costs of the appeal to this House.*

Lords' Journals, March 17, 1925.

Solicitors for the appellants: *Rawle, Johnstone & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

Solicitor for the respondents: *The Solicitor, Board of Trade.*

[PRIVY COUNCIL.]

J. C.* 1925 Feb. 17.

GOH CHOON SENG . . . . . APPELLANT;

AND

LEE KIM SOO . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS (SINGAPORE).

Negligence—Master and Servant—Liability for Act of Servant—Scope of Employment—Act involving unauthorized Trespass.

An employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do, even if the act incidentally involves a trespass which the employer has not authorized.

Lord Bolingbroke v. *Swindon Local Board* (1874) L. R. 9 C. P. 575 explained and distinguished.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 65 of 1924) from a judgment of the Court of Appeal of the Straits Settlements, Singapore (September 6, 1923), affirming a judgment of the Supreme Court.

The respondent brought an action in the Supreme Court for damages caused by the negligence of the appellant, or his servants, in kindling a fire, whereby the respondent's pottery works were destroyed.

The facts appear from the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiff, and ordered an inquiry as to damages; that judgment was affirmed by the Court of Appeal.

1925. Jan. 26, 27. *Macaskie* for the appellant. The fire was not kindled upon the land of the appellant, but upon adjoining land of the Crown. The appellant cannot be held to have impliedly authorized his servants to commit an act of trespass: *Lord Bolingbroke* v. *Swindon Local Board* (1); *Joseph Rand* v. *Craig.* (2) The employment by the appellant extended only to acts to be done upon his own land:

* *Present:* LORD WRENBURY, LORD PHILLIMORE, and LORD CARSON.

(1) L. R. 9 C. P. 575. (2) [1919] 1 Ch. 1.

M'Namara v. *Marquess of Sligo*. (1) The kindling of the fire beyond the appellant's boundary was an act done by his servants for their own convenience and benefit, and was therefore outside the scope of their employment: *Storey* v. *Ashton*. (2) [Reference was made also to *Lloyd* v. *Grace, Smith & Co.* (3); *Goff* v. *Great Northern Ry. Co.* (4); and *Bayley* v. *Sheffield, Manchester and Lincolnshire Ry. Co.* (5).]

Hon. Sir Malcolm Macnaghten K.C. and *Hon. Geoffrey Lawrence* for the respondent were not called upon.

Feb. 17. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The defendant-appellant was the owner of a coco-nut, fruit and rubber estate near Singapore, and the plaintiff-respondent was the lessee of a small adjacent property upon which were certain pottery works and kilns. The respondent's property was to the N. and W. of the appellant's property, and the two properties were conterminous along the S.E. boundary of the respondent's land as far as that extended. Then came some Crown land left waste and uncultivated, wedged in between the S.W. boundary of the respondent's property and the continuation of the appellant's property, from which latter it was divided by a bamboo hedge.

On July 28, 1922, a fire or fires for the purpose of burning branches, jungle trees and other vegetable rubbish was or were kindled close to the bamboo hedge and spread across the wedge of Crown land on to the respondent's land, and burnt down a number of the buildings upon it.

For the damage thus sustained the respondent sued the appellant, alleging that the fire or fires had been negligently kindled or allowed to spread by the servants of the appellant. The appellant denied that this servants had kindled any fire, and suggested that it was kindled on the Crown side of the hedge and might have been done by squatters.

From the evidence given at the trial it appeared that there

(1) [1918] 2 I. R. 215.
(2) (1869) L. R. 4 Q. B. 476.
(3) [1912] A. C. 716.
(4) (1861) 3 E. & E. 672.
(5) (1873) L. R. 8 C. P. 148.

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were three heaps of vegetable refuse fit for burning on the appellant's side of the hedge, but that light had not been set to two of these, and that the third had been burnt out probably some time before. There were also three heaps on the Crown land side of the hedge, all of which had been recently kindled and were seen to be smouldering later on in the same day.

The learned judge who tried the case came to the conclusion that the damage was caused by one or all of the fires on the Crown land and not by any fire on the appellant's land, but that the fires which did the mischief had been kindled by the servants of the appellant, who had come through the bamboo hedge and made their heaps on the Crown land. He gave judgment for the respondent, referring the amount of the damages to the registrar for assessment.

Appeal was taken to the Supreme Court of the Straits Settlements, where the judgment was affirmed. From this affirmance the present appeal has been brought.

The first point taken is that the learned judge was wrong in holding that there was sufficient proof that the fire was kindled by the servants of the appellant. As to this matter, their Lordships can express their opinion quite briefly.

Where there are concurrent findings of fact by the Court of first instance and the Court of Appeal, it is only in rare cases and upon special grounds that their Lordships advise that the decision should be reversed. Upon the evidence as recorded in this case there was ample ground for the decision on this point of fact, and it must stand.

The appellant, however, raised a further point in the Court of Appeal, both by his memorandum of appeal and by the argument of the counsel, to this effect: that the judge was wrong in holding that, if the fires were kindled by the defendant's servants, they were acting within the scope of their authority.

The argument takes its foundation from the fact that the fires were not kindled on the appellant's land, but upon that of a third party, and it is said that, as this involves a trespass and therefore an illegality by the appellant's servants, no authority from the master can be implied.

It does not appear that this point was taken at the trial, and it may be that, if it had been taken, evidence could have been adduced sufficient for the Court to infer that leave and licence had been given by the Crown or by somebody in occupation under the Crown to carry the rubbish through the hedge and burn it on waste spots on the uncultivated land; in which case there would have been no trespass.

Their Lordships will, however, assume that there may have been a trespass. Still, they would agree with the judges of the Supreme Court that the kindling of the fires was not outside the scope of authority of the appellant's servants, and that he is responsible for the negligent way in which the fires were kindled and controlled.

The authority upon which learned counsel for the appellant principally relied was *Lord Bolingbroke* v. *Swindon Local Board*. (1) In that case the manager of the sewage farm for the Local Board, having extensive powers of management, when cleaning a watercourse which served as a boundary, took upon himself to cut away the bank on the further side so as to widen it, and in doing so cut down brushwood, underwood and trees which impeded the course of the stream. An action for the trespass being thereupon brought against the Local Board, it was held by the Court that the manager had exceeded his authority, which, though ample for anything to be done upon the land of the Local Board, was confined to that land, and that the Local Board was therefore not responsible for his acts. Upon the construction which the Court put upon the special facts of the case, the decision seems to follow; but these facts are unlike those of the present case.

To begin with, the action in that case was not for negligence, but one brought for trespass by the party upon whose land the trespass had been committed. This distinction is pointed out in the judgment of the Supreme Court. The trespass, as Brown J. observed, was an essential element in the acts complained of. Here it is merely an incident. There is no rule of law that it cannot be within the implied scope of

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authority of a servant that he should not in the course of his work commit some minor act of trespass. In the present case it is not disputed that the men working on the appellant's plantation had authority to pile the rubbish in heaps and to set fire to it, and that if the fires had been on the other side of the hedge there would have been no such defence to the action.

The principle is well laid down in some of the cases cited by the Chief Justice, which decide that " when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act."

As the learned Chief Justice says, the manager of the plantation was authorized by his employment to burn the weeds, and that he did it in a manner and at a place which were not authorized by his employer, makes no difference. Time and place are only circumstances or incidents. It is not even suggested that it would have made any difference to the mischief done if the fires had been kindled on the appellant's side of the hedge.

As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1.) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2.) and (3.) Under head (2.) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3.) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized,

had he known of it. In these cases the master is, nevertheless, responsible.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

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Solicitors for appellant: *Pyke, Franklin & Gould.*
Solicitors for respondent: *Tamplin, Tayler & Joseph.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE STRAITS SETTLEMENTS . . . . } APPELLANT;

AND

PANG AH YEW . . . . . RESPONDENT.

J. C.* 1925 *March* 10.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Straits Settlements—Petition of Right—Sale of Land for Arrears of Land Revenue —Non-compliance with Ordinance—Ordinance No. 35 (*Land Revenue Collection*), *s.* 4—*Ordinance No.* 22 (*Crown Suits*), *s.* 20.

Under the Crown Suits Ordinance (No. 22) of the Straits Settlements a petition of right can be maintained to recover damages arising from a collector of land revenue selling land under Ordinance No. 35 for arrears of revenue without first serving a written notice of demand as required by s. 4. The collector in selling is an agent of the Crown although he acts under statutory authority, and the fact that he has carried out his duties in an unauthorized manner does not prevent the Crown from being liable.

Attorney-General of the Straits Settlements v. *Wemyss* (1888) 13 App. Cas. 192 followed.

Judgment of the Supreme Court affirmed.

APPEAL (No. 80 of 1924) from a judgment of Appellate Court of the Supreme Court of the Straits Settlements, Singapore (December 22, 1923), affirming a judgment of Barrett-Lennard J., whereby a motion by the present appellant was dismissed.

By the motion giving rise to the appeal the appellant

* *Present:* LORD WRENBURY, LORD PHILLIMORE, and LORD CARSON.

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prayed for an order that a petition of right presented by the respondent under the Crown Suits Ordinance (No. 22) of the Straits Settlements should be dismissed.

The circumstances in which the petition of right was presented, and the provisions of the Ordinances applicable, appear from the judgment of the Judicial Committee.

The motion was dismissed by Barrett-Lennard J., who held that the collector of revenue was acting as an executory officer of the Crown, not as a statutory entity irresponsible to the Sovereign; and that the Crown was liable for his acts or defaults.

An appeal to the Appellate Court was dismissed by Shaw C.J., Brown J., and Reay J.

1925. Jan. 27. *Hayden K.C.* and *Giveen* for the appellant. The Crown is not responsible for the acts and defaults of the collector in carrying out his duties under Ordinance 35. The collector is given a discretionary power by the Ordinance, and he alone is responsible for its exercise. Apart from the Ordinance the Crown had no right to sell the land. The act of the collector was wholly illegal and outside the scope of his authority as an agent of the Crown. Any exception from the general rule that the Crown is not liable in tort must be clearly established. *Attorney-General of the Straits Settlements* v. *Wemyss* (1) is distinguishable, as the Crown was there acting directly by its agent. The decision is no authority for liability in the circumstances of this case. [Reference was made also to *Tobin* v. *The Queen* (2), and *Viscount Canterbury* v. *Attorney-General.* (3)]

The respondent did not appear.

March 10. The judgment of their Lordships was delivered by

LORD CARSON. This litigation was commenced by a petition of right presented by Pang Ah Yew, the present respondent, in which she claimed a declaration that a sale of certain lands by one F. J. Morten, collector of land revenue,

(1) 13 App. Cas. 192. (2) (1864) 16 C. B. (N. S.) 310.
(3) (1842) 1 Ph. 306, 324.

Malacca, should be set aside and an inquiry be directed as to the damages sustained by reason of the said sale, or, in the alternative, as to the amount of compensation payable to her for the loss of her property.

The case arose on a motion by the appellant, who is the Attorney-General for the Straits Settlements, for an order that the petition of right presented by the respondent should be dismissed as being bad in substance and in law, and upon other grounds, and disclosed no cause of action against the Crown.

The case was heard before Barrett-Lennard J., sitting at Singapore, who, by his order dated April 16, 1923, ordered that the said motion should be dismissed. The appellant appealed against the said order and the appeal was heard before the Chief Justice and two other judges sitting as the Appellate Court of the Supreme Court of the Straits Settlements; and the said Court, by the order dated December 22, 1923, ordered that the said appeal should be dismissed and that the costs of the respondent should be paid by the appellant.

The respondent held a certain rubber estate, comprised under a statutory land grant, situated at Tanjong Minyak, which she had purchased at the price of $6000, and which, under the said grant, was subject to a small quit rent payable to the Government. In her petition she averred that the quit rent for the year 1920 was duly paid, but that that for the following year 1921 had been inadvertently overlooked by her. She also averred that no notice of demand, as required by s. 4 of Ordinance No. 35 (Land Revenue Collection), was served on her or on her mandore and tappers in charge of the land; nor was any inquiry made from either of these persons as to her address; nor was it posted on the said land; and she also complained that resort was not first had against the personal property of the respondent on the land as required by s. 5 of the said Ordinance. Notwithstanding the fact that the provisions of the Ordinance, as before mentioned, had not been complied with, she complained that on March 27, 1922, her land was sold under s. 7 of the said Ordinance at the price of $45, and that the purchaser in taking possession

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of the said land appropriated all the personal properties of the respondent.

The two main questions argued in the Courts below and before this Board were (1.) whether the collector, in doing what was complained of, was acting as an executive officer of the Crown; and (2.) whether, if so, the Crown could be held liable for the illegal acts of the collector as being acts done within the scope of his authority.

The first question arises under s. 20 of Ordinance No. 22 (Crown Suits), which is as follows: "Any claim against the Crown founded on the use or occupation or right to use or occupation of Crown lands in the colony, and any claim arising out of the revenue laws or out of any contract entered into, or which should or might have been entered into on behalf of the Crown by or by the authority of the Government, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, and any claim against the Crown for damages or compensation arising in the colony shall be a claim cognizable under this Ordinance."

Sect. 21 under the heading of Petition of Right enacts that any person having such claim may prefer his complaint by petition.

No question can now be raised as to the right under the Ordinance to recover damages or compensation by a petition of right against the Government upon the grounds that the remedy of a petition of right is, as in this country, not available in the case of a tort. The words of the Ordinance seem to be perfectly clear upon this point, but the matter is finally settled by the case of *Attorney-General of the Straits Settlements* v. *Wemyss* (1), decided with reference to this same Ordinance.

As Shaw C.J. says in his judgment in the present case, referring to the case cited, "It is impossible to contend that the local Government, here representing the Crown, is not liable to compensate an individual injured by the wrongful act of an officer of the Government acting within the scope

(1) 13 App. Cas. 192, 196.

of his employment in similar circumstances to those in which an ordinary individual would be liable to pay compensation for the wrongful act of his servant or agent. In considering English authorities, therefore, it must be borne in mind that the liability of the Crown for actionable torts in this colony is created by statute and renders in many respects the reasoning on which English cases have been decided entirely inapplicable."

There can be no doubt that the claim made by the respondent in the present case was a claim against the Crown founded either " on the use or occupation of Crown lands in the colony or a claim arising out of the revenue laws, or any contract entered into on behalf of the Crown by or with the authority of the Government." It was said, however, that the collector in the action he took was not acting as the agent of the Government or as its servant, but was acting under statutory authority. Their Lordships cannot accede to this view, and it is only necessary to look at the Ordinance under which the collector acted, to disprove such a contention. Ordinance No. 35 of 1886 is an Ordinance " to provide for the collection of the land revenue of the Crown," and by s. 2 " collector " means " collector of land revenue of the settlement or district in which the land is situated in respect of which any sum is due and payable to the Crown on account of rent or assessment." In collecting the revenues of the Crown the collector was undoubtedly acting as the agent or servant of the Crown, and the fact that he is carrying out his duties under statutory directions and limitations cannot make any difference. He is the intermediary employed by the Crown, even though the methods by which he is to proceed are prescribed by the Ordinance, and it is to be noted that under s. 13 of the Ordinance, powers are given to the Governor in Council to make rules for carrying out the provisions of the said Ordinance.

It is further to be observed that under the Public Authorities Protection Ordinance (No. 132) no action lies against any person acting in execution of statutory duties or other public duties, unless the party complaining can allege malice and

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want of reasonable or proper cause. The result therefore would be that if the contention of the appellant succeeded the subject would be, in the absence of malice, without any remedy.

There was some suggestion made before the Courts below that the collector was in some sense a judicial or quasi-judicial officer and that his acts could not be questioned. This argument was not much pressed before the Board, nor do their Lordships think there is any ground for supporting such an argument.

As to the other question whether the Crown or Government can be held liable for the acts complained of as not being within the scope of the collector's employment, their Lordships agree with the decision of the Chief Justice that this plea cannot prevail and that the Crown, under the Ordinance, like any other employer, is liable where in carrying out an authorized act or duty the servant employed does, or omits to do, something which renders his method of carrying out his duties unauthorized and wrongful. It is unnecessary to consider the authorities, which are very fully dealt with by the judgments in the appellate Court.

The two cases mainly relied upon before this Board were the cases of *Tobin* v. *The Queen* (1) and *Viscount Canterbury* v. *Attorney-General*. (2) In the first of these cases the captain of a Queen's ship employed in the suppression of the slave trade, seized a ship that he was not authorized to seize, and instead of carrying it into port, for the purposes of convenience destroyed it on the high seas. In that case the relationship between the Crown and the captain of a ship of the Royal Navy did not produce the relationship of employer and employed, or principal and agent, and in doing what he did the captain, while purporting to act in accordance with certain duties imposed upon him by statute, committed an act which the statutes did not authorize. Their Lordships cannot see any principle involved in that decision which conflicts with the judgment that has been given in the present case. Similarly, in *Viscount Canterbury* v. *Attorney-General* (2) the Commissioners

(1) 16 C. B. (N. S.) 310. (2) 1 Ph. 306.

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of Woods and Forests, who are a statutory body established under an Act of the Imperial Parliament, were held not to have been acting in the capacity as agents or servants of the Crown. In both cases no action could lie against the Crown in this country as involving actions of tort, and in both cases the relations of the Crown to the alleged tortfeasor were entirely different. Indeed, no analogy can be found in either of these cases and the one under consideration, having regard to the fact that the plaintiffs' claim is based upon the specific terms of the Ordinance already quoted.

Their Lordships are, therefore, of opinion that the decisions appealed against in this case were right and that the appeal should be dismissed. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Burchells.*

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ATTORNEY-GENERAL FOR MANITOBA APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Manitoba)—Legislative Powers of Province—"Direct Taxation"—Tax on Sales of Grain for future Delivery—Tax indirect in certain cases—Stats. of Man., 1923, *c.* 17—*British North America Act* (30 & 31 *Vict. c.* 103), *s.* 92, *head* 2.

A tax is not "direct taxation" within s. 92, head 2, of the British North America Act, 1867, unless in substance it is one which is demanded from the person who it is intended should pay it, even if the Act imposing it declares that it is to be a direct tax upon the person who pays.

In answer to questions referred by the Governor-General—namely: (1.) whether the Legislature of Manitoba had authority to enact ch. 17 of its Statutes for 1923, entitled "An Act to provide for the collection

* *Present:* VISCOUNT CAVE, VISCOUNT HALDANE, LORD DUNEDIN, LORD BLANESBURGH, and LORD DARLING.

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of a tax from persons selling grain for future delivery," and (2.) if the Act was ultra vires in certain parts, then in what particulars it was ultra vires :—

Held, that the Act was wholly ultra vires, since in many transactions to which it related the person paying the tax would indemnify himself at the expense of others, and it was not possible to assume that the Legislature intended to pass it in a truncated form.

Cotton v. *The King* [1914] A. C. 176 and *Burland* v. *The King* [1922] 1 A. C. 215 followed.

Judgment of the Supreme Court [1924] S. C. R. 571 affirmed.

APPEAL (No. 101 of 1924) by special leave from a judgment of the Supreme Court of Canada (May 13, 1924) in the matter of a reference to that Court by the Governor-General under s. 60 of the Supreme Court Act.

The questions referred to the Supreme Court were :—

(1.) Had the Legislature of Manitoba authority to enact ch. 17 of its Statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery" ?

(2.) If the said Act be, in the opinion of the Court, ultra vires in part only, then in what particulars is it ultra vires ?

The material terms of the Act, and the nature of the transactions to which it related, appear from the judgment of the Judicial Committee.

The Supreme Court answered the first question in the negative. In view of that answer, no answer was made to the second question. The proceedings are reported at [1924] S. C. R. 371.

1925. March 3. *Tilley K.C.* and *Hon. Geoffrey Lawrence* for the appellant.

Clauson K.C. and *T. Mathew* for the respondent the Attorney-General for Canada.

Lafleur K.C. for the respondents the Attorneys-General for Saskatchewan and Alberta.

As to the meaning of the words "direct taxation" in s. 92, head 2, of the British North America Act, 1867, reference was made to *Attorney-General for Quebec* v. *Queen Insurance Co.* (1) ; *Attorney-General for Quebec* v. *Reed* (2) ; *Bank of*

(1) (1878) 3 App. Cas. 1090. (2) (1884) 10 App. Cas. 141.

Toronto v. *Lambe* (1); *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario* (2); *Cotton* v. *The King* (3); *Burland* v. *The King*. (4)

March 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This case comes by way of appeal from the Supreme Court of Canada. To that Court the Governor-General of Canada had, under a statutory power, referred two questions relating to the constitutional validity of a taxing statute passed by the Legislature of Manitoba. The questions were as follows :—

First, had the Legislature of Manitoba authority to enact ch. 17 of the Statutes of 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery ? "

Secondly, if the said Act be, in the opinion of the Court, ultra vires in part only, then in what particulars is it ultra vires ?

Under the British North America Act of 1867 a Provincial Legislature may exclusively make laws relating to direct taxation within the Province for raising revenue for Provincial purposes. Such a Legislature is given no power to levy a tax which is indirect.

The Supreme Court of Canada (consisting of Idington, Duff, Anglin, Mignault and Malouin JJ.) answered the questions submitted to them, in the sense that the Act was ultra vires. Anglin J., however, took no part in the judgment.

In order to appreciate the question raised it is necessary to set out the relevant sections of the statute of Manitoba under discussion, the Grain Futures Taxation Act. After defining "grain" as meaning wheat, oats, barley, rye and flaxseed, and "agreement of sale" or "agreement to sell" as covering options, calls in, puts and calls, and offers, indemnities and privileges; and "exchange" as including all agencies, boards of trade, bourses, auction or other meeting places, at which grain and other products or merchandise are

(1) (1887) 12 App. Cas. 575.
(2) [1897] A. C. 231.
(3) [1914] A. C. 176.
(4) [1922] 1 A. C. 215.

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publicly bought, sold, bid for, offered or exchanged, for future delivery or contracts for such future delivery are made, the statute provides (s. 3) :—

"That upon every contract of sale of grain for future delivery made at, on or in any exchange, or similar institution or place in Manitoba, except as hereinafter provided, the seller or his broker or agent shall pay to His Majesty for the public use of the Province a tax computed upon the gross quantities of grain sold or agreed to be sold, as follows : Upon every thousand bushels of flaxseed, 12 cents ; upon every thousand bushels of wheat, 6 cents ; upon every thousand bushels of oats, barley or rye, 3 cents.

4. No such tax shall be payable in any case in which—

(*a*) the seller is the grower of the grain, or

(*b*) either party to the contract is the owner or tenant of the land upon which the grain is to be grown, or

(*c*) the sales are cash sales of grain or other products or merchandise which in good faith are actually intended for immediate or deferred delivery (such transactions for the purposes of this Act to be evidenced by the actual transfer of the tickets, storage or warehouse receipts, bills of lading or lake shippers' clearance receipts, or other documents of title for grain transferring actual ownership from the vendor to the purchaser in exchange for the price at the maturity of the contract), or

(*d*) the sales are 'transfer' or 'scratch sales' or 'pass-outs,' provided that the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person, or

(*e*) the sales are made by a broker on account of a principal, and the name of the principal is not disclosed to the buyer, provided the principal sells to the broker the same quantity and the same grade and kind of grain at the same price, on the same day, on the same exchange, the only tax in this case being the tax payable by the principal.

5. The tax imposed by this Act shall be a direct tax upon

the person actually entering into the contract of sale, whether such person is the principal in the contract or is acting only in the capacity of a broker or agent for some other person and is imposed solely in order to supplement the revenues of this Province.

6.—(1.) The tax hereby imposed shall be payable in cash by the seller, his broker or agent, in each case, and every person liable to pay such tax shall send to the minister, not later than the 10th day of each month, a return showing the particulars of all sales made by him during the preceding calendar month in respect of which any tax is imposed upon him by this Act, accompanied by payment of the total amount of all such taxes."

An agreed statement of facts put in by the Attorneys-General concerned shows the course of business in the sale and disposal of grain to which the Act may apply. From this statement it appears that the ultimate market price for grain in Canada and Western America, the producing countries, is determined in the great importing markets in Great Britain and Europe. This is a "world price," which is but little controlled by the producers, and which has to be looked to to cover all the items in cost of production and of transportation. The landowner or farmer who produces the grain sells it to a country elevator manager, or may deliver it to him for warehousing. The purpose is to sell the grain so as to make a profit on the fluctuating world market price. Whoever has to make the sale naturally tries to get the best price of the moment. It may not be wise to sell at once. He accordingly watches the market. But he desires to avoid possible loss from a drop in market price while he is watching his opportunity. To guard against this he "hedges" by selling on the Winnipeg Grain Exchange for future delivery an equivalent quantity of grain. His aim in this is to eliminate the risk which he runs from fluctuations in the general market price while waiting to sell what he actually possesses. This he forwards to a terminal elevator and sells at a suitable moment for cash. He then extinguishes his obligation on the sale of the "future" which he has already

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made as insurance by purchasing on the Winnipeg Exchange an equal quantity for future delivery, thus extinguishing his liabilities as regards the two obligations in the future. These are cancelled out in the books of the clearing house in Winnipeg, and, as he has now sold for cash what he actually held, the risk from fluctuation of price is at an end.

There are minor variations and differences in form which affect classes of transactions upon this principle of insurance by future dealing. But the practice does not vary in its substantial aspect, and it is a characteristic one. Obviously, it involves much employment of brokers and mere agents to carry it out, and these, it is agreed, charge any tax on the transaction to the customer as part of the expenses incurred.

The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect.

As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of s. 92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples.

It does not exclude the operation of the principle if, as here, by s. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867. In *Cotton* v. *The King* (1), followed in *Burland* v. *The King* (2), this Board held that in the case of a Provincial succession duty, intended to be collected from

(1) [1914] A. C. 176. (2) [1922] 1 A. C. 215.

a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and who was naturally entitled to recover the amount paid from the persons succeeding to the estate, the taxation was ultra vires. A probate duty (as distinguished from such a succession duty), paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation. In *Attorney-General for Quebec* v. *Reed* (1) Lord Selborne had laid down an analogous application of the same principle. *Bank of Toronto* v. *Lambe* (2) is another case in which Lord Hobhouse, applying the same principle, found the tax to be direct. In *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario* (3) Lord Herschell, in delivering the opinion of the Board, followed this case on the ground that the licence tax in question was demanded from the very person who it was intended or desired should pay it, as a tax on his licence with no expectation or intention that he should indemnify himself at the expense of any other person.

On the scope of the taxation imposed by the Act now under consideration there is little room for doubt. The tax is not a licence tax; it is one to be levied upon the contracts made for the sale of grain for future delivery. There is exemption when the seller under the contract is the grower of the grain, and when either party to the contract is the owner or tenant of the land on which the grain is to be grown; but in nearly every other case the person entering into a contract of sale for future delivery has to pay a tax proportionate to the quantity sold. It is obvious that this liability will extend, not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of grain has been entrusted for sale. The agreed statement says in its conclusion that the grain business has many ramifications, all of which fall within the kind of transaction it describes, but all

(1) 10 App. Cas. 141. (2) 12 App. Cas. 575.
(3) [1897] A. C. 231.

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of which the statement does not attempt to specify. To a large number of these the exemptions may not apply. If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. In other words, if the statute is ultra vires as regards the first class of cases, it has to be pronounced to be ultra vires altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.

Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting.

This view makes it unnecessary to consider the further point raised in the judgment of Idington J., that the taxing Act was passed in violation of the provision in s. 121 of the British North America Act, that all articles of the growth, produce or manufacture of any one of the Provinces shall be admitted free into each of the other Provinces. On this point their Lordships refrain from expressing any opinion.

The Supreme Court of Canada answered the first question in the negative and treated the second as not arising.

Their Lordships will humbly advise His Majesty that these were the proper answers and that the appeal should be dismissed. In accordance with the usual practice there will be no costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

ARISTIDE OUELLETTE . . . . . APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY . . . . . RESPONDENTS.

J. C.* 1925 *March* 30.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Railway — Train crossing Highway — Statutory Requirements — "Train"—Interpretation of Statute—References to previous Legislation — Railway Act, 1919 (9 & 10 *Geo.* 5, *c.* 68, *Dom.*), *s.* 2, *sub-s.* 34; *s.* 310, *sub-s.* 1.

By s. 310, sub-s. 1, of the Railway Act of Canada, 1919: "Whenever in any city, town or village, any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

By s. 2, sub-s. 34, "'train' includes any engine, locomotive, or other rolling stock," unless the context otherwise requires:—

Held, that for the purposes of s. 310, sub-s. 1, two engines and tenders coupled together and running backwards—that is to say, with the tender of the foremost engine being pushed ahead—constituted a "train," and that that part of it which was foremost was the leading tender, not the foremost engine.

The words of the section not being ambiguous should not be interpreted by reference to previous legislation upon the subject.

Judgment of the Supreme Court [1924] S. C. R. 426 reversed.

APPEAL (No. 109 of 1924) by special leave, in forma pauperis, from a judgment of the Supreme Court of Canada (June 6,

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW, LORD PHILLIMORE, and LORD DARLING.

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1924) reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (December 28, 1923), which affirmed a judgment of the Superior Court.

The appeal arose out of an action brought by the appellant in the Superior Court of Quebec to recover damages caused by the death of his two minor sons who were killed at a level crossing in the city of Hull; he alleged that their deaths were due to the negligence of the servants of the respondent railway company.

The substantial question arising upon the appeal was as to the true effect of s. 310, sub-s. 1, of the Railway Act of Canada, 1919.

The facts, the terms of the section, and the effect of the judgments of the Courts in Canada appear from the judgment of the Judicial Committee.

The appeal to the Supreme Court is reported at [1924] S. C. R. 426, and that of the Court of King's Bench at 36 Q. R. (K. B.) 431.

1925. Feb. 27. *D. N. Pritt* for the appellant.
Tilley K.C. for the respondents.

March 30. The judgment of their Lordships was delivered by

LORD SHAW. The respondent company operates a line of railway running through Hull near Ottawa in the Province of Ontario. The line crosses, at rail level, St. Florent Street of the former town. The level crossing is open, without protecting gates or guard.

On the afternoon of August 31, 1922, two children of the appellant, 10 and 13 years of age, were riding in a Ford motor lorry, driven by one Bertrand, when an accident took place at the level crossing. Two engines and tenders of the respondent company, coupled together and running backwards—that is to say, with the tender of the foremost engine being pushed on ahead—ran into the lorry, and the appellant's children were killed.

The evidence is voluminous, but the admissions made in the argument sufficiently raise the point of law. These

admissions were (1.) that the foremost of the two engines was, besides, of course, shoving on its tender before it, pulling the hindmost engine and tender; and (2.) the driver and stoker of the foremost engine were prevented by the tender in front of it from seeing the lorry on the crossway until after the tender had struck it.

An action for damages ensued, and it was tried before Acting Chief Justice Martin and a jury. The jury found that the accident was due partly to the negligence of Bertrand, the driver of the lorry, and partly to the fault of the respondent company "for not having a man on the back of tender." By the law of Quebec, in cases of divided responsibility the Court is allowed to divide the damages. The jury having found $3000 damages in all, the Court accordingly awarded one half against Bertrand and one half against the railway company.

The railway company moved the Court that, notwithstanding the verdict, the action should be dismissed on the grounds (inter alia) that "there was no legal obligation on the part of the defendant to have a man at the end of the tender," and that the absence of a man on the front end of the tender was not "a fault in law." The trial judge dismissed the motion and entered judgment against the railway company for $1500.

The company, being still dissatisfied, appealed to the Court of King's Bench for the Province of Quebec (Appeal Side). That Court, consisting of five learned judges, unanimously dismissed the appeal.

The company, being still dissatisfied, appealed to the Supreme Court of Canada. Two of that Court agreed with the six judges in the Courts below, but three of them thought otherwise, and the appeal was sustained and the action dismissed. Hence the present appeal.

The questions before the Board turn on the construction of certain sections (in particular s. 310) of the Railway Act of Canada of 1919.

Sect. 310, sub-s. 1, provides as follows: "Trains or cars moving reversely"—"310 (1) Whenever in any city, town

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or village, any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway. 1917, c. 37, s. 7."

The interpretation clause of the Act is s. 2. By sub-s. 34 thereof "train" includes any engine, locomotive, or other rolling stock; and by sub-s. 25: "rolling stock" means and includes any locomotive, engine, motor car, tender, snow plough, flanges and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of the company.

If this were a train, then the foremost part of it was the back of the tender which was being pushed forward by the first engine. De facto, there was no man on that foremost part, and de facto also, as stated, there was no warning given. It was, indeed, impossible for the engine driver or stoker of the engine to perform the duty of look-out and warning, as the tender obscured their view of the railway track and the borders thereof. It was in these circumstances therefore also impossible to take effectively those precautions which the statute plainly intended should be made for the protection of persons "standing on, or crossing, or about to cross the track" of the railway. Prima facie, s. 310 of the statute had been disobeyed, and the protection it was meant to afford to citizens in their foot and vehicular passage at the level crosssing was not afforded; the fatal results ensued; and the company's responsibility is plain. This would be so unless the section really provides something different from what its words in ordinary use mean.

The respondent company, however, maintains that there was no obligation to put a man upon the foremost part of the train—namely, the tender—first, because the two engines with their tenders did not constitute a "train," and, secondly, because "engine" includes "tender," and the man on the engine was therefore on the tender, and the engine was in the front, and those on the engine, whether they could see

forward or not, were on the foremost part of the train. The majority of the learned judges of the Supreme Court have upheld these contentions. Their Lordships, having carefully perused the opinions, are unable to agree. On the contrary, they agree with the two learned judges of the minority and with the judgments of the six learned judges of the Court below.

The argument for the respondent company, of course, depended upon the construction of the sections of the statute referred to. That construction was approached from two points of view—namely, first, from the point of view of the words themselves in their ordinary meaning, and, second, from the point of view of these words according to the light thrown upon them by the context and also in particular by previous railway legislation.

(1.) Was this a train ?

Their Lordships think it was. They cannot agree with the view that to constitute a train there must be cars attached to the engine. Sub-s. 34 says plainly that a train includes any engine, locomotive, or other rolling stock, and rolling stock comprehends a large list of things and of equipment "designed for moving on its wheels." According to the argument there might have been a long string of locomotives, engines, motor cars, tenders, snow ploughs, flanges, and other equipment upon wheels, but all that would not have been a train unless there had been cars there. In the result this would make the level crossing on the track traversable by all that class of vehicles without look-out and without warning, and with all the concomitant dangers accordingly to the public at the crossing, and this on the ground that the accidents were caused by railway stock in motion, drawn or pushed by engine power, but that such accidents were not caused by a train. Their Lordships disagree with these views.

Secondly, the company insists that, on a proper construction of the section, a tender is not something which can be separately considered, but is simply part of the engine, and that accordingly, whether the engine goes first and its driver and stoker have a clear view and the tender is behind them,

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or whether the tender goes first and obscures the view of the driver and stoker, comes to all the same thing. It is simply, so it is argued, one engine, and whether it be going with its tender in front or behind, being just an engine, it must be always held to be leading its train.

The argument is answered by a simple reference to sub-s. 25 defining rolling stock. In it the engine is treated as one thing in a considerable enumeration of things, and the tender is treated as another thing. But the next point upon s. 310 is that it does not deal with engines or tenders as such in this provision protective of the public and passengers on the track. It deals with the point as to a proper look-out and warning by a person who is to be stationed, not upon the engine named as such, or the tender named as such, but upon "that part . . . . which is then foremost."

It need hardly be remarked that, for practical purposes, which are as just stated, protective and remedial, the section would, as already indicated, entirely fail if it was to be so construed that the foremost part of the train, manifestly chosen as the proper part for look-out and warning, was to be treated as a part from which such look-out and warning were impossible.

Their Lordships are of opinion that the section should not be so construed, and they agree with the learned judges of the minority in the Supreme Court, that a construction of the words which would go far to impair their protective and remedial character is distinctly contrary to the manifest intention of the Canadian Legislature. They desire to add that in the opinion of the Board the words of the section are not doubtful or ambiguous, but are, for all practical purposes, quite clear. Their Lordships incline to the view that this would also have been the opinion of the learned judges of the majority had it not been that they thought that they were moved by a comparison of the language of the section with that employed in previous legislation.

Such a reference to previous legislation may be forced upon a Court by reason of the ambiguity employed in the use of terms which the mind could not readily grasp without a

previous preliminary interpretation. But it is always a process of construction which is accompanied with much danger. In the view of the Board there was no need to resort to such method in the present case, for the simple reason thus put by the learned Malouin J. : " Le legislateur est présumé avoir voulu dire ce qu'il exprime et le juge ne peut chercher en dehors du texte de la loi son intention quand le texte est clair et ne prête à aucun doute."

It is important that the results of the labours in Canada of bringing the law compendiously up to date whether these may be characterised by the term " revision " or " codification " should be not impaired by the danger alluded to. As Lord Halsbury said in *Bank of England* v. *Vagliano Brothers* (1), a well known case dealing with the construction of the language employed in the English Bills of Exchange Act : " It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed." It is true that, when such comparison is entered upon, quite a variety of changes of expression may occur. This is not unnatural. As is remarked by the learned Idington J. : " And a remarkable feature of the contention is that the plain meaning of the words are to be given another meaning because some words used in an old Act were dropped out, when such changes as made were obviously part of a revision of the entire legislation relative to railways, and intended to make clearer the law and improve in many respects by eliminating useless verbiage."

But the danger of error would become acute if once presumption were to be made that because there was a difference of expression, therefore it must necessarily follow that there was meant to be a difference of the law. The words actually

(1) [1891] A. C. 107, 120.

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employed must stand for interpretation as they are found unaffected by any such presumption. In the present case their Lordships' reference to previous legislation was not required, there being no confusion or ambiguity to remove.

Their Lordships, however, out of respect to the learned judges, have considered the change of language upon which they found. The predecessor of s. 310 of the present Railway Act was s. 276 of c. 37 of the Revised Statutes for Canada of 1906. That section was in these words: "Whenever in any city, town or village any train is passing over or along a highway rail level, and is not headed by an engine *moving forward in the ordinary manner*, the company shall station on that part of the train, *or of the tender, if that is in front*, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway." The words which are italicised have been omitted in the present statute. The omission having taken place, the section is less cumbrous, and effects the very same object of protection of pedestrians and others using level crossings in a town, just the same as before. It can never be suggested that the Legislature intended to remove a manifest protection to the public, without plainly saying so, but as an inference arising from a comparison of statutory texts. To take the instances alluded to by the learned judges in the majority in the Court of Appeal: If a train is not headed by an engine, then the company is to station on the foremost part of the train persons to warn those standing on or crossing the track. This applies clearly to the case where the tender is that part of the train which is then foremost, and if the tender is the foremost part of the train, which it undoubtedly is, there was no occasion, as in the old statutes, for mentioning the tender at all if that was in the front, because the tender, of course, is the part of the train foremost at any rate. If the engine was not moving forward in the ordinary manner—that is to say, was backing—then, of course, it was shoving the train or the tender in front of it. It had the foremost part of the train in front of it—namely, the tender—and the whole of those words italicised were unbusinesslike and surplusage as

compared, so the Legislature might have thought, with the far better expressed s. 310 of the latest revision.

In their Lordships' opinion this train was headed by a tender—properly so called—and not by an engine. It was therefore not a train to be excused from the conditions prescribed by the Railway Act of Canada, 1919, s. 310, sub-s. 1.

Did the Legislature of Canada really intend, by the readjustment of the forms of expression as stated, to impair or undo the warning and protection given to the public at level crossings in towns and villages in Canada ? It is, in their Lordships' opinion, in the last degree unlikely that any such intention could have been entertained, nor was it carried out. Of course, if the words " on a reasonable construction " could not mean anything else, a Court would be bound to accept such a result, however unexpected and lamentable, but upon a sound construction of the words they think that the jury were rightly advised, and they agree with the opinion of the eight judges in the Courts below and think that the argument for the respondents is erroneous.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed with costs in the Courts below, and with such costs of this appeal as are in practice awarded to parties appearing in forma pauperis.

Solicitors for appellant : *Lawrence Jones & Co.*
Solicitors for respondents : *Blake & Redden.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 April 3.

ROBERTS . . . . . APPELLANT;

AND

HOPWOOD AND OTHERS . . . . . RESPONDENTS.

Local Government—Borough, District and Town Councils—Excessive Payments to Employees—Disallowance and Surcharge by District Auditor—Discretion of Council—Duty of Auditor—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 62—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247, *sub-s.* 7.

By s. 62 of the Metropolis Management Act, 1855, a metropolitan borough council, as the successors of the Board of Works, "shall . . . . employ . . . . such . . . . servants as may be necessary, and may allow to such . . . . servants . . . . such . . . . wages as (the Council) may think fit."

By s. 247, sub-s. 7, of the Public Health Act, 1875, as applied to the accounts of metropolitan borough councils, the district auditor "shall disallow any item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment."

In the year ending March 31, 1922, a metropolitan borough council, as in the previous year, paid to its lowest grade of workers, whether men or women, a minimum wage of 4*l.* per week, notwithstanding that the cost of living had fallen during that year from 176 per cent. to 82 per cent. above the pre-war level, the borough council being of opinion that 4*l.* was the least wage which a local authority ought as a model employer to pay for adult labour. The district auditor found that these payments were not wages but gratuities to the employees, and were contrary to law, and, starting with the pre-war rate of wages paid by the council, added on a bonus proportionate to the increase in the cost of living and a further 1*l.* by way of margin, and disallowed the excess over that sum and surcharged the same upon the councillors responsible for the payments:—

Held (1.), that the discretion conferred upon the council by the statute must be exercised reasonably, and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion; (2.) that an expenditure upon a lawful object might be so excessive as to be unlawful, and that to the extent by which the amount exceeded legality the auditor was bound to disallow it and surcharge the excess upon the persons responsible.

Held, therefore, that the disallowance and surcharge were rightly made.

Decision of the Court of Appeal [1924] 2 K. B. 695 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Divisional Court. (2)

* *Present*: LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

(1) [1924] 2 K. B. 695.

(2) [1924] 1 K. B. 514.

The question to be determined was whether the appellant as district auditor was entitled to disallow and surcharge upon the respondents, aldermen and councillors of the metropolitan borough of Poplar, a sum of 5000*l.* in respect of certain payments made by the council to their workpeople as being contrary to law.

The facts are fully stated in the report before the Court of Appeal and sufficiently appear from the opinion of Lord Buckmaster.

The respondents having obtained a rule nisi for a writ of certiorari addressed to the appellant with a view to quashing the appellant's certificate of disallowance and surcharge, the Divisional Court (Lord Hewart C.J., Sankey and Salter J.J.) discharged the rule, but their decision was reversed by the Court of Appeal, by a majority (Scrutton and Atkin L.JJ.; Bankes L.J. dissenting), and the rule was made absolute.

1925. Feb. 24, 27; March 2. *Macmillan K.C.* and *Sir John Lithiby* for the appellant. The question whether the disallowance and surcharge complained of by the respondents have been rightly made turns, first, upon the powers of the district auditor in auditing the borough accounts and, secondly, upon the powers of the council in regard to the remuneration of their servants. The powers of the auditor are derived from sub-s. 7 of s. 247 of the Public Health Act, 1875, as applied to the accounts of metropolitan borough councils, which imposes upon the district auditor a duty to "disallow every item of account contrary to law and surcharge the same" on the persons responsible for "the illegal payment"; and the powers of the council from s. 62 of the Metropolis Management Act, 1855, as applied to metropolitan borough councils, which empowers the council to allow such wages to their servants as they "may think fit." Under sub-s. 7 of s. 247 of the Public Health Act, 1875, the district auditor has to consider every item of account and to determine the legality not merely of the object but of the quantum. To the extent to which any item of expenditure upon a legitimate object exceeds what is legitimate he must disallow

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that item. It is objected that in the absence of mala fides —and mala fides is not suggested—the discretion of the council cannot be called in question by the auditor. But a district auditor has a larger duty than, say, the auditor of a limited company, whose function is to see that the items appearing in the balance sheet correspond with the vouchers. It is part of his duty to protect the borough funds against improper expenditure and to determine whether any particular item of expenditure is unreasonable in the sense of being "contrary to law." "Contrary to law" includes the whole ambit of proper administration. Then, as to the discretion conferred upon the council by s. 62 of the Metropolitan Management Act, 1855: Is that an absolute discretion? The view which has prevailed is that where a discretion is confided to a public body having public duties to discharge then, if something is done which is unreasonable, that is not a proper exercise of the discretion. All the circumstances relevant to the exercise of the discretion must be taken into consideration. The discretion conferred upon the council is not an uncontrolled discretion, but must be exercised reasonably. The standard of reason is implicit in all the powers entrusted to a public body of this kind. It is objected that the auditor has no power to deal with extravagance or exorbitancy, and this argument is based upon the history of the poor law legislation. By the Poor Rate Act, 1810, justices in petty sessions were authorized to examine into the matter of the poor law accounts and to disallow all such charges as they should deem to be unfounded and to reduce such as they should deem to be exorbitant. By the Poor Law Amendment Act, 1834, a different system was adopted, but it was held that the power of the justices under the earlier Act had not been superseded: *Reg.* v. *Earl of Dartmouth.* (1) Then by the Poor Law Amendment Act, 1844, extended powers were given to auditors and the audit was made for the first time an effective engine for the examination of the poor law accounts and for the protection of the ratepayers; but the

(1844) 5 Q. B. 878.

word "exorbitancy" disappears, and the argument is that the language of the Act of 1844 is narrower than that of the Act of 1810. That is not a reasonable or probable construction to put upon an Act which clothed the poor law auditor with powers which he had never before possessed, and there is no ground for the objection. The leading authority on this branch of the law is the decision of Palles C.B. upon the corresponding Irish statutes in *Rex* (*King-Kerr*) v. *Newell.* (1) In the Irish code, as in the English, the word "exorbitancy" had dropped out, and the learned judge disposes of the argument founded on its omission by saying that the word was omitted because it was tautologous and redundant. He dealt with the payments in question in that case under the head of illegality and treated as illegal any sum which was unreasonable. That case decides first that the auditor may disallow a sum in part, and secondly that any excess above what is reasonable is illegal. [Counsel also referred to *Rex* v. *Roberts* (2) and *Reg.* (*Inglis*) v. *Drury.* (3)] By s. 4 of the London Government Act, 1899, the new metropolitan councils have had transferred to them the powers of their predecessors under various Acts, which the latter had adopted, such for example as the Baths and Washhouses Acts of 1846 and 1878 and the Burial Act of 1852, in each of which the power to pay salaries and wages is expressed in the following words: "may appoint reasonable salaries, wages and allowances." Is it to be said that the Council are to have an uncontrolled discretion as to the payment of wages to their employees in these departments? The result of the respondents' contention must lead to confusion and inconsistency. The auditor is not objecting to the payment of high wages as such, but he maintains that the payments made are beyond any conceivable reasonable standard and are therefore contrary to law. The question is one of degree, which is always embarrassing, but these wages may be fairly described as so clearly excessive that the matter has passed out of the

(1) [1903] 2 I. R. 335. (2) [1908] 1 K. B. 407, 418.
(3) [1898] 2 I. R. 527n.

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region of debatable ground. The auditor is not saying that any particular standard constitutes an absolute standard to which the authority must conform, and it is for that reason that he has superadded to the cost of living standard and the trades union awards standard 1*l.* per week to provide for possible variations in local labour conditions, and having allowed that wide margin he has treated the excess as not being an exercise of the discretion vested in the Council. In fact he treats these payments as gratuities. Though the various standards which have been referred to are not binding on the council they are nevertheless useful as affording the best evidence of what is a reasonable remuneration. Where a discretion is reposed in a public body the ambit of discretion must be regulated to some extent by the subject matter: *Brown* v. *Dean* (1); *Hick* v. *Raymond & Reid* (2); *Sharp* v. *Wakefield* (3); *Reg.* v. *St. Pancras Vestry* (4); *Kruse* v. *Johnson.* (5) The defence is that the council should be a model employer, and that that justifies them in paying an arbitrary sum to their adult employees without regard to existing labour conditions. That is not an exercise of their statutory power, which in fact amounts to no more than if nothing had been said about wages at all. The council may employ servants, and must pay them according to some reasonable standard, though they are at liberty to take local conditions into account.

Sir John Simon K.C. and *Croom-Johnson* (with them *Arthur Henderson*) for the respondents.

The test of the auditor's jurisdiction in sub-s. 7 of s. 247 is whether the item is contrary to law and not whether the auditor regards it as unreasonable or extravagant. The language is not apt to suggest that the auditor is to tax any particular item, as in the case of a solicitor's bill. Contrast the language of s. 247, sub-s. 7, and s. 249. It is conceded that quantum may be conceivably a subject for the auditor's consideration, but only where the item is so

(1) [1910] A. C. 373, 375.
(2) [1893] A. C. 22, 29.
(3) [1891] A. C. 173, 179.
(4) (1890) 24 Q. B. D. 371, 375–6.
(5) [1898] 2 Q. B. 91, 99.

large that no local authority could in the exercise of its discretion possibly have arrived at any such figure. Adding 20*s.* to the sum allowed does not alter the question. No surcharge can stand unless the payment is illegal. By s. 62 of the Metropolis Management Act, 1855, the borough council may pay such wages as it may think fit. The test, therefore, is not the test of a reasonable judgment exercised by a reasonable auditor or a reasonable Court. Exorbitance or extravagance, in the sense of paying beyond what a reasonable man thinks necessary or inevitable, is not the test. The audit confers no power to order an increase of wages in the case of a policy of cheeseparing or undue economy. The auditor has nothing to do with the fact that a local authority takes what may be called either an unduly narrow view or an unduly generous view. Until the point is reached that the payment is an illegal payment there is no opportunity for the district auditor to intervene. The normal case of illegality is where the object to which the money is being devoted is illegal. Another case is where, the object being legal, the necessary formalities have not been observed. For example, under the Local Government Act, if the local authority makes a contract for more than 50*l.*, the contract must be made under seal. But in this case, if the disallowance is to be upheld it must be because the payment is so vast that on a fair examination any tribunal must say that this is not a payment of wages at all, but is a pure gift. This surcharge can only be justified, if at all, on the ground that the outlay is so entirely out of proportion to the necessities of the case that some part of it is illegal. If these payments can be disallowed it would seem to follow that, the borough council having made a contract to employ a workman at that rate, the contract could not be enforced. On the facts, this House ought not to arrive at the conclusion that these payments were so gross that no local authority, whatever its policy might be, could make them if it was content to act within its statutory discretion. To the local authority is entrusted a very wide ambit of discretion, and it is for the authority

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itself to determine the amount of the wages to be paid to its employees. It is not a true proposition to say that the local authority is bound not to pay more than the amount for which the labour can be obtained in the market. The local authority has always paid a minimum wage which is fair and reasonable, and does not intend to fluctuate from day to day by reason of external circumstances.

Macmillan K.C. replied.

The House took time for consideration.

1925. April 3. LORD BUCKMASTER. My Lords, the appellant in this case is the district auditor originally appointed by the Local Government Board (now represented by the Minister of Health) for the purpose of auditing year by year the accounts of the metropolitan borough councils. In the performance of this duty he has surcharged the respondents, who are certain aldermen and councillors of the Poplar Borough Council, with the sum of 5000*l.* for the year between April 1, 1921, and April 1, 1922. The question on this Appeal is whether that surcharge has been lawfully made.

Before considering the facts it would be well to examine the powers with which the district auditor is invested. These are to be found in s. 247 of the Public Health Act of 1875, a section rendered applicable to the accounts of the metropolitan borough councils by s. 14 of the London Government Act of 1899 and s. 71 of the Local Government Act of 1888. Sub-sect. 7 of s. 247 contains the directions imposing upon the auditor the duty of making disallowances and surcharges. It is in the following words: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on

application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made." It is to be observed that this sub-section consists of two branches; the first deals with the disallowance of every item contrary to law and surcharging the sum as therein provided, and the second with the deficiency or loss incurred by negligence or misconduct which is to be charged against the person who is accounting. It is suggested that this latter provision is really applicable to the officers or assistants of any local authority whose accounts, by s 250 of the Public Health Act, are also to be audited by the auditors. It is quite possible that this is the true explanation of the different branches of the sub-section, but its determination is unnecessary in the present case, because it is not alleged that there has been negligence or misconduct in any person. It is said that the amounts disallowed are contrary to law, and that the making of them constituted the making of an illegal payment, so that it is the first branch of the section alone with which this Appeal is concerned. As it was at one time contended that the power to disallow an item by the auditor did not include the power of disallowing part of the expenditure in respect of any heading of expense, but merely a striking out of the item if, from the nature of the object, it was outside the powers of the council and consequently illegal, it is well to state that in my opinion there is no foundation for such an argument. An item in an account is not merely a heading; it includes both the object and the payment, and, while the object may be lawful, the expenditure in respect of it may be so excessive as to be unlawful, and to the extent by which the amount exceeds legality it is the duty of the district auditor to disallow it and surcharge the sum on the person responsible for its being made. It is that which the district auditor contends he has done in the present case. The power of revising the decision of the auditor is to be found in sub-s. 8, which enables a person aggrieved to apply for a writ of certiorari to remove the disallowance to the King's Bench Division, where the whole matter is subject to revision. This

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is the course that has been adopted. An order nisi was obtained on June 26, 1923, calling upon the district auditor to show cause why a writ should not issue against him, and upon the rule being heard the Divisional Court, on November 21, 1923, dismissed the order calling upon the district auditor to show cause, and this decision was reversed by the Court of Appeal, Bankes L.J. dissenting from the other members of the Court.

The relevant facts which induced the district auditor to make the surcharges in question are as follows :—

During the years 1920 and 1921 the ordinary rates of wages, whether measured by taking as a standard wages for the same work paid immediately before the war and adding thereto the percentage representing the increased cost of living, or by taking the amounts fixed by the Joint Industrial Councils' award as the proper sum to be added to the pre-war wage, showed violent oscillations. Nor did these two standards always vary together. Towards the end of 1920, when the cost of living was falling, the Joint Industrial Councils' award was at its maximum, but subject to this qualification the two lines did on the whole rise and fall in harmony. The three classes of wages in respect of which the surcharges have been made were women (Grade A), general labourers, and men to whom the trade union scale for masons and paviors applied. So far as the women were concerned they were paid throughout from April 1, 1920, to April 1, 1923, at a level weekly wage of 80*s.*, the pre-war wage being 23*s.* 6*d.*, brought up by considering the added increased cost of living to 54*s.* 6*d.* on April 1, 1921, and descending to 43*s.* on April 1, 1922. The Joint Industrial Councils' award gave for the month of April, 1921, 69*s.* 6*d.*; for May, June and July, 62*s.* 6*d.*; for August, September and October 57*s.* 6*d.*, from which level it descended by steps to 51*s.* 6*d.* on April 1, 1922, and continued to descend to April, 1923.

I do not propose to examine in similar detail the wages for the general labourers, the masons and paviors, for this reason : that if those wages stood alone, the amount of the surcharge in respect of them would not be very great and would be

almost wholly applicable to the last two months. The district auditor, in determining the line above which he regards the payments as illegal, has taken the pre-war rate, increased it by the cost of living and added to that a sum of 20*s.* a week by way of margin. It is, of course, easy to find fault with any definite standard so ascertained; why it should not be a little lower or a little higher, and by what means it was fixed at the exact sum assessed can always give rise to controversy, but regarding, as I do, the duty of the auditor to declare unjustifiable payments to be illegal and to surcharge the excess, it follows that some line must be drawn, as the extent of the illegality can only be measured by taking it at above a particular standard. If the powers of the district council are limited to the payment of fair and even full wages, measured not actually in but by reference to the terms of standard rates fixed either by trade unions or by joint councils, there could, I think, be little objection to what the auditor has done, but the real difficulty in the present case lies in determining what is the limit of discretionary power given to the district council with regard to payment of wages. Now those powers are to be found in s. 62 of the Metropolis Management Act of 1855, which runs as follows: "The Metropolitan Board of Works, and (subject to the provisions herein contained) the board of works for every district under this Act, and the vestry of every parish mentioned in Schedule (A.) to this Act, shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit."

The power there conferred is to appoint for the purposes of the Act such servants as may be necessary and to pay these servants such wages as the council may think fit. It is to be noticed that there is not in this section a qualification often found in other sections conferring upon local authorities power to pay wages, such as to pay reasonable wages, which

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is found in the Baths and Washhouses Act of 1846, and again in the Burials Act of 1852. I mention these two Acts for this reason, that the powers that they confer are capable of being adopted by any borough council, though they are not, until adopted, expressly conferred by the Local Government Act of 1899. The confusion that these different definitions of the powers creates is made obvious when it is considered that were the Acts once adopted, servants might be appointed to perform in respect of the powers thereby conferred services identical with those performed under the powers that are expressly conferred by the Act of 1899 itself, and unless the word "reasonable" be introduced into the operative s. 62 or struck out from the sections of the adopted Acts two different standards of payment would apply to the same work. It is impossible to accept a conclusion so fantastic, and it follows that either the two phrases mean the same thing or that one must give way to the other.

In my opinion the right way to construe it is to take s. 62 as the dominant section and to assume that if the other Acts are adopted under the Act of 1899, the general powers of s. 62 apply, and servants appointed to discharge these new duties are really appointed for the purpose of the Act within the meaning of s. 62, and that consequently the general rule applicable is that the council shall pay such wages as they may think fit, the discretion as to the reasonable nature of the wages being with them. The discretion thus imposed is a very wide one, and I agree with the principle enunciated by Lord Russell in the case of *Kruse* v *Johnson* (1), that when such a discretion is conferred upon a local authority the Court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised.

Turning to what the borough council have done, the reason for their action is to be found in the affidavit sworn by Mr. Scurr, Mr. Key, Mr. Lansbury and Mr. Sumner. In para. 6 of that affidavit they make the following statement: "The council and its predecessors the district board of works have

(1) [1898] 2 Q. B. 91, 99.

always paid such a minimum wage to its employees as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether ascertainable by Trade Union rate, cost of living, payments by other local or national authorities or otherwise." And if the matter ended there it would be my opinion that a decision so reached could not be impeached until it were shown that it was not bona fide, and absence of bona fides is not alleged in the present proceedings. Para. 9, however, of the same affidavit puts the matter in a different form. It is there said: "9. . . . . The Council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decisions as to wages."

Now it appears that on August 31, 1921, a resolution was passed by the borough council to the effect that no reduction of wage or bonus should be made during the ensuing four months, and this was acted upon for the following twelve months. It was, I think, well within their power to fix wages for a reasonable time in advance, and there are cogent reasons why this should be done, but that decision should be made in relation to existing facts, which they appear to have ignored. In August, 1921, the cost of living had been continuously falling since November of the previous year, and it continued to fall, so that it is difficult to understand how, if the cost of living was taken into account in fixing the wages for adult workers at a minimum basis of 4*l.*, the sharp decline in this important factor should have been wholly disregarded by the borough council. But the affidavit contains another statement, which I think is most serious for the council's case. It states that 4*l.* a week was to be the minimum wage for

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adult labour, that is without the least regard to what that labour might be. It standardised men and women not according to the duties they performed, but according to the fact that they were adults. It is this that leads me to think that their action cannot be supported, and that in fact they have not determined the payment as wages, for they have eliminated the consideration both of the work to be done and of the purchasing power of the sums paid, which they themselves appear to regard as a relevant though not the dominant factor. Had they stated that they determined as a borough council to pay the same wage for the same work without regard to the sex or condition of the person who performed it, I should have found it difficult to say that that was not a proper exercise of their discretion. It was indeed argued that that is what they did, but I find it impossible to extract that from the statement contained in the affidavit. It appears to me, for the reasons I have given, that they cannot have brought into account the considerations which they say influenced them, and that they did not base their decision upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion imposed upon them by the statute.

It is for these reasons that I think the Appeal should succeed.

LORD ATKINSON. My Lords, the questions to be determined in this Appeal are first, whether certain payments of sums of money, purporting to be payments of wages, made by the council of the metropolitan borough of Poplar (called for convenience "the council") to its workpeople during the year ending March 31, 1922, were, upon the evidence in the case, "contrary to law" within the meaning of the seventh sub-section of s. 247 of the Public Health Act, 1875, and secondly, whether the appellant, the district auditor, whose district includes the metropolitan borough of Poplar, was entitled to disallow and surcharge upon the respondents, aldermen and councillors of the council (hereinafter called

"the respondents"), the sum of 5000*l.* in respect of these payments.

The decision of these questions involves the consideration of first, whether it is the duty of a district auditor to consider the reasonableness of the charges and payments appearing in the account of local authorities, and also whether he has power to disallow unreasonable charges and payments, or whether his duty in dealing with any payment purporting ex facie to have been made for an authorized purpose is confined to merely vouching the payment of the sum appearing to have been expended, without questioning the reasonableness of the amount; and second, the question as to the scope of the discretion vested by Parliament in the metropolitan borough councils in connection with the payment of salaries and wages.

One must start upon these inquiries with a clear appreciation of the fact that in this case the servants to whom these challenged payments were made were of the lowest grade of labour. That is not disputed.

In the year 1914—i.e., before the war—the auditor states in his affidavit, that there was not in that year any striking variation in the scale of wages adopted by the councils of the several metropolitan boroughs for the several grades of their employees; that the scales of wages paid in 1914 by this council were not the highest, but compared with those of other councils were somewhat above the average; that the minimum wage for the lowest grade of labour in Poplar borough in that year was 30*s.* weekly for men and 22*s.* 6*d.* weekly for women. These facts are not disputed. The answer the respondents give to them will be found in para. 8 of their case. It runs thus: "For a long time prior to the war the Council had maintained a minimum wages limit of 30*s.* per week. Payments to these amounts were, prior to 1914, treated at the audit as involving a proper exercise by the Council of the discretion vested in them." The vanity of appearing as model employers of labour had not then, apparently, taken possession of the council, nor had the council become such ardent feminists as to bring

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about, at the expense of the ratepayers whose money they administered, sex equality in the labour market. The auditor states in his affidavit that various increases were made by the council in the years between 1914 and 1920, that on April 30, 1920, the minimum wage for the lowest grade of labour was 64*s.* weekly for men and 49*s.* 9*d.* weekly for women. And, according to the statements contained in this same paragraph, a resolution was then passed fixing the minimum rate of wages at 80*s.* per week for both men and women, or an increase of 16*s.* per week in the case of men and 30*s.* 3*d.* in that of women. Thus suddenly did female labour of the lowest grade appear to have increased in value. The auditor, in the sixth paragraph of his affidavit, states that he uses the words "cost of living" as meaning the cost of living determined by the Ministry of Labour and published weekly in the Labour Gazette of that Ministry; that in the year 1920–21 this cost of living had risen to 176 per cent. beyond what it was in the year 1914, and that though in the year 1921–22 the cost of living had decreased to only 82 per cent. over what it was in 1914, the minimum rate of wages for men and women at 80*s.* remained unchanged.

It is but right and natural that the rate of wages should rise if the cost of living rises, because this tends directly to keep the purchasing power of the labourer's wage at what it was before the cost of living increased. The principle apparently adopted by the council, however, is that wages should rise if the cost of living rises, but should never go down if the cost of living goes down.

As I understood Sir John Simon, he did not contend ultimately that the council could properly or legally fix the salaries or wages of their employees at an excessively high rate. He apparently thought that this would be an unjust and unlawful exercise of their discretion, and from the last few lines of the judgment of Scrutton L.J. he was apparently of the same opinion. Moreover, Scrutton L.J. thought that the sums fixed by the council in this case while near the line of excess did not actually reach it. In order, however, to determine in such a case as this what is the line of excess,

one must first determine what is the line of moderation in such matters, the datum line—as it may be styled—beyond which excess begins. Scrutton L.J. apparently took the Whitley Council or cost of living rates as this datum line. That is the meaning, it would appear to me, of the following passage in his judgment running thus (1): "I then ask myself whether the wages paid in the year April, 1921—April, 1922, are so far in excess of Whitley Council or cost of living rates that I can find that there is an excess over any reasonable amount that could be fixed by the discretion of a representative assembly."

I entirely concur with the conclusion expressed by Bankes L.J. in the following passage of his able and well-reasoned judgment. After referring to the speech of Mr. George Lansbury and the affidavits of the Mayor of Poplar and others pled in support of the rule, he said (2): "The arguments there set out are of such a general and vague character that the question which the Court has to decide cannot be disposed of without a closer investigation of the facts. In the absence of precise and detailed information as to the grounds on which the Council acted their action must, in my opinion, be judged by its results. The results according to the finding of the district auditor are that the payments made in many instances were far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency, and were thus in reality gifts to their employees in addition to remuneration for their services. If this finding is justified upon the evidence it establishes, in my opinion, the making of payments contrary to law. It must be borne in mind what the payments are for. They are payments for wages; that is to say, the price which the employer pays the employee for his or her services. Of recent years the tendency has everywhere been to standardize wages by either fixing the actual rate to be paid or by fixing minimum rates. In some cases the Legislature has stepped in to bring about this result. In most cases it has been due to the action of organized labour or associations consisting of employers and

(1) [1924] 2 K. B. 721. (2) [1924] 2 K. B. 711.

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employed. The result has been to create in relation to labour what, in relation to commodities, is recognized as a market price."

He then proceeds to show that the market price may vary according to local conditions, but that for any well-recognized form of labour it is ascertainable and can be ascertained. But the council, according to the affidavit of Mr. John Scurr, disregarded all external matters such as these as aids to arrive at a conclusion as to what was the so-called market wage for which the services required by the council could be procured, and what excess beyond that, if any, was reasonable.

In the sixth paragraph of Mr. Scurr's affidavit he states that "the Council have always paid such a minimum wage as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether by trade union rates, cost of living, payments of other local or national authorities or otherwise." Nobody has contended that the council should be bound by any of these things, but it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair, just and reasonable wage to pay their employees for the services the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.

In para. 9 of Mr. Scurr's affidavit he is good enough to disclose what the council did take into consideration in fixing the minimum rate of wages to be paid to their employees. He said that they had from time to time considered the question of wages, and were of opinion that a public authority

should be a model employer, and that a minimum rate of 4*l.* per week (i.e., 208*l.* per annum) is the least wage which ought to be paid to an adult, having regard to the efficiency of their workpeople; the duty of a public authority both to the ratepayers and to its employees; the purchasing power of the wages, and other considerations which are relevant to their decision as to wages. He is not good enough to mention what are those other considerations. There is no provision relative to the nature of the work to be done by the women, or their fitness for it. The minimum wage was to be the same as that of men, however different the nature of the work.

This system of procedure might possibly be admirably philanthropic, if the funds of the council at the time they were thus administered belonged to the existing members of that body. These members would then be generous at their own expense. The evidence does not disclose what sum the rates of the district amounted to, or what portion of that gross sum was paid by the persons who were members of the council since, say, the month of March, 1920; but it may safely be assumed, I should think, that these members did not, at any time, pay the whole of the rates then collected. The council then, at all times since the year 1914, may safely be assumed to have been dealing with funds a portion of which—possibly the larger portion of which—was contributed by ratepayers who were not, and are not members of the council. The indulgence of philanthropic enthusiasm at the expense of persons other than the philanthropists is an entirely different thing from the indulgence of it at the expense of the philanthropists themselves. The former wears quite a different aspect from the latter, and may bear a different legal as well as moral character. A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are

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not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others.

This duty is, I think, a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been done "contrary to law" within the meaning of sub-s. 7 of s. 247 of the Public Health Act of 1875. To make an act contrary to law it is not necessary that it should be prohibited by some legal enactment such as a statute or a by-law or the like. Many things are contrary to law though not prohibited by any statute, such for instance as the purchase by a trustee from his cestui que trust of part of the trust property, the purchase by an agent from his principal of the latter's property without full disclosure of who the purchaser really is, and what are the particulars of the purchase. The torts which are at law covered by the legal maxim "Sic utere tuo ut alienum non laedas," are in many instances not prohibited by statutes, yet they are illegal and actionable at law.

At the meeting on May 31, 1923, at which a large number of ratepayers attended and objected to the allowance of such large sums for wages, it was apparently put forward that the council were only responsible to their constituents; that the scale of wages had been before the electors at the election in the previous November, and also at two recent bye-elections, and had been approved of by them; that the council should do their duty towards these electors, and not their duty towards the large ratepayers who lived outside the district and were not "in" (i.e., parties to, I presume) this matter at all. A gentleman named L. W. Key, one of the applicants in the present suit, appears from the auditor's affidavit to have put the council's case pithily and plainly in the following few words: "We do not say we have no discretion, but we say a mandate from the electorate was not to be despised." These observations do not appear to have been disapproved of by any of the members of the council present. I assume, of course, that the gentleman expressed honestly what he felt and believed. It was strongly pressed in argument that

the auditor believed the council acted bona fide; but what in this connection do the words "bona fide" mean? Do they mean, as apparently this gentleman thought, that no matter how excessive or illegal their scale of wages might be, they were bound to put it into force because their constituents gave them a mandate so to do, or again, do the words mean that as the payment of wages was a subject with which they had legally power to deal, the amount of their funds which they devoted to that purpose was their own concern which no auditor had jurisdiction to revise, or in reference to which he could surcharge anything? The whole system of audit to which the Legislature has subjected every municipal corporation or council is a most emphatic protest against such opinions as these. The words of sub-s. 7 of s. 247 of the Public Health Act of 1875, rationally construed, show that the auditor, in order to perform his task, has necessarily jurisdiction to inquire into the legality of every payment, and to disallow and surcharge payments of money on every item of account. He may disallow it if it be excessive, and therefore illegal contrary to law, or if the excess be severable from the remainder of the payment he may disallow and surcharge this excess and allow the remainder of the payment. All these points have been decided by that able and distinguished judge Palles C.B. in *Rex.* (*King-Kerr*) v. *Newell* (1), and see *Reg.* (*Inglis*) v. *Drury* (2), approved of by him in *Reg.* (*King-Kerr*) v. *Newell*: see also *Reg.* (*Duckett*) v. *Calvert* (3); and by O'Brien C.J. in his judgment in *Reg.* (*Bridgeman*) v. *Drury* (4). If the business of the auditor was merely to vouch the payment of the money paid in discharge of items ex facie legal, the audit would afford no protection whatever against the squandering of public funds.

The London Government Act of 1899, by sub-s. 1 of its fourth section, transfers to the borough councils all the powers and duties theretofore belonging to the elective vestries and district boards situate within the districts of the newly created councils. It is under this provision that s. 62 of the Metropolis

(1) [1903] 2 I. R. 335.
(2) [1898] 2 I. R. 527n.
(3) [1898] 2 I. R. 511, 525.
(4) [1894] 2 I. R. 489.

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Management Act of 1855 becomes applicable to metropolitan district councils. This section enacts that the boards of works for every district under the Act, and the vestry of every parish mentioned in Schedule A attached to the Act, are empowered to appoint or employ or continue for the purposes of the Act, or remove at pleasure such clerks, treasurers or surveyors or other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors and such other officers and servants respectively such salaries and wages as the board or vestry may think fit. Upon these words "think fit" much argument has turned. By s. 247 of the same Act of 1855, all the Acts of Parliament in force in any parish or place, so far as they are inconsistent with this Act, are repealed as regards such parish or place notwithstanding any provision of the Act containing, and transferring respectively to vestries of parishes, and transferring to district boards any duties, powers or authorities now vested in vestries, commissioners or other bodies. The section is not very clearly worded, but I assume it was intended by it to delete, and that it did in effect delete, from the first five of the statutes mentioned on p. 13 of the appellant's case, the controlling word "reasonable" wherever it occurs in the sections providing for the appointment of employees or the grant or payment of salaries, wages or allowances, on the ground that these statutes are earlier in date than the Act of 1855, are inconsistent with this latter Act, and are therefore repealed. The question remains, however, how are the several statutes of a later date than 1855 containing provisions as to the reasonableness of the payment of salaries, wages and allowances similar to those of the repealed statutes to be construed?

Sect. 247 of the Act of 1855 cannot affect them, and unless the words "may think fit" used in s. 62 are equivalent to the words "may think reasonably fitting," the most absurd results must follow. For instance, if one takes the Baths and Washhouses Act of 1846, the paying body must now only pay such salaries as they may think fit, but the authority under the Baths and Washhouses Act of 1878, the duties of

their employees being somewhat similar, must pay to these latter reasonable salaries, wages and allowances.

These statutes later in date than the Act of 1855 are eight in number, and cover almost the entire field of local administration. Three, or at most four, of them dispense with the controlling word "reasonable"—namely, the Education Act, 1870, the Public Health Act, 1875, which apparently substitutes in reference to the remuneration of clerks and treasurers the control of the Local Government Board for the word "reasonable," and the Public Libraries Act, 1892, which by s. 15 provides that the governing body may appoint salaried officers and servants, but does not impose any control or suggest any measure. In such a case I think it would have to be taken in law that the remuneration should be reasonable. And the Local Government Parish Councils Act by its seventeenth section enacts that their clerk, where there is no assistant overseer, is to receive such remuneration as the parish council may think fit.

But as wages are remuneration for services, the words "think fit" must, I think, be construed to mean "as the employer shall think fitting and proper" for the services rendered. It cannot, in my view, mean that the employer, especially an employer dealing with moneys not entirely his own, may pay to his employee wages of any amount he pleases. Still less does it mean that he can pay gratuities or gifts to his employees disguised under the name of wages. The only rational way by which harmony of administration can be introduced into the various departments of Local Government covered by s. 62 of the Act of 1855, and by the several more recent statutes aforesaid, is by holding that in each and every case the payment of all salaries and wages must be "reasonable." I see no difficulty in so construing the words of s. 62.

I entirely concur with Bankes L.J. and think his judgment sound and convincing. I do not think it necessary to comment on those maps or grades which show the rise of women's wages. It is enough to say that their wages, having been raised from 23*s.* 6*d.* to 80*s.* per week, are kept at that figure

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through the years 1921, 1922 and 1923, though the bonus corresponding to the extra cost of living, and the bonus of the Joint Industrial Councils Award after April 1, 1921, rapidly declined.

What is a reasonable wage at any time must depend, of course, on the circumstances which then exist in the labour market. I do not say there must be any cheeseparing or that the datum line, as I have called it, must never be exceeded to any extent, or that employees may not be generously treated. But it does not appear to me that there is any rational proportion between the rates of wages at which the labour of these women is paid and the rates at which they would be reasonably remunerated for their services to the council.

I concur with the auditor in thinking that what has been given to the women as wages is really to a great extent gifts and gratuities disguised as wages, and is therefore illegal. The council have evidently been betrayed into the course they have followed by taking into consideration the several matters mentioned in Mr. Scurr's affidavit, which they ought not properly to have taken into their consideration at all, and consequently did not properly exercise the discretion placed in them, but acted contrary to law : see *Reg.* v. *Adamson* (1) ; *Reg.* v. *St. Pancras Vestry* (2) ; *Rex* v. *Board of Education.* (3)

I think the appeal succeeds.

LORD SUMNER. My Lords, the legal problem, which this appeal raises, is how to adjust the relation between s. 247, and especially its sub-s. 7, of the Public Health Act, 1875, and s. 62 of the Metropolis Management Act, 1855. Under the former section, by sub-s. 1, " the accounts and expenditure " of such a borough council as that of Poplar " shall be audited once in every year by the auditor of accounts relating to the relief of the poor "—who in this case is the appellant—and, by sub-s. 7, the auditor " shall disallow every item of

(1) (1875) 1 Q. B. D. 201. (2) 24 Q. B. D. 371.
(3) [1910] 2 K. B. 165, 179.

account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment."

Pausing here, I point out that both sub-sections are unqualified and are imperative. The accounts, that is all of them, shall be examined and audited, and the auditor shall disallow every item of account contrary to law. I reject the suggestion that the only accounting party liable to be surcharged is either some borough official or is the borough council itself. Furthermore I put aside as absurd the contention that "item" means only the name of the object of the expenditure and is exclusive of its amount. The effect would be, that the auditor could not examine at all into the prices paid for goods purchased. Extravagant expenditure on permitted objects would receive an absolute charter of immunity, and a statutory body, strictly tied up in one dimension, would be free to move to infinity in another. At this point, therefore, we find an enactment, which binds the council to submit to the auditor's examination all their expenditure and binds him to examine the whole and every part of it in order to test its legality, and to disallow any and every expenditure found to be contrary to law.

Passing now to s. 62 of the Metropolis Management Act, 1855, the respondents found themselves upon its final words, "such salaries and wages as the board or vestry may think fit," and contend that, in effect, they remove the amount of wages paid beyond the scope of effective criticism. The council may pay in good faith what wages they please. It is not said that they can pay, if they please, unreasonable wages, but that, for all purposes, what they please is what is reasonable. Their reason is substituted as the test of reasonableness for that of the auditor or of the Courts of law. All the same the result is that expenditure, which is in fact wholly unreasonable, is on this view not contrary to law, if the council bona fide choose to incur it. This is a pure paradox. Now the section is mandatory; it imposes an obligation to employ, and by implication that involves a power to do what employment involves—namely, to pay

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wages. If this had been left to implication, the wages would have to be reasonable in amount and their amount would be examinable. Do the express words of the power to pay negative this ? If they do, it is only as to the rates of wages. All the other terms of the employment must be examinable, such as hours worked and holidays enjoyed on full pay, for these in part measure the quid pro quo, which the servant gives for his wages. Nothing is expressed which can leave these matters absolutely to the council, and, if they are improvidently agreed to, the council may be involved in examinable and disallowable expenditure. With the wages themselves it is said to be a different matter. This may be so. It depends on the sound construction of the section ; but, if so, the result would be a legislative oddity.

My Lords, the section imposes a duty coupled with a power. In the case of an actor, who is the creation of the law, it is from some provision of that law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived. In the case of a section conferring a statutory power on one person there is no necessity to read into it an intention to limit a statutory power conferred on some other person, nor is there any need to imply an exemption of the exercise of the power, which the section itself gives, from subsequent review under powers to that effect given by another and, in this case, a later Act. Language may, of course, have been employed of a scope so wide as to lead to this result, but prima facie empowering words have had their due effect and are spent, when the power has been effectually conferred.

My Lords, the two sections of these two separate Acts have to be read together, and I fail to see what difficulty there is in doing so as follows. Sect. 62 of 1855 tells the council that they must employ servants, who will have to receive wages, and it tells them that they need not seek further authority for the amount to be paid, but by virtue of the section itself may pay the wages on their own authority to such amount as they think fit. The effect is that such payments will not be ultra vires. The employee may receive

them without being under any liability to refund, if their amount should afterwards be challenged, and the council's treasurer may pay on the council's instructions without fear of being personally liable for applying the council's funds in excess of their power to direct him to pay. Such a provision is in place in s. 62, but there its operation ceases. Another Act then begins to operate. At the end of the year all the council's accounts have by law to be examined by the auditor. They have settled with their employees, but they are accountable employers still, for they administer public funds, which have been raised by levying rates, and they must give an account of their stewardship. It is because the money paid is now beyond recall that the councillors themselves may be surcharged. This is for practical purposes the crux of the situation. If the statutory consequences had been merely that the councillors would be told not to do it again, very little would ever have been heard of this kind of argument, but extravagant disbursements would go unchecked. I see no antinomy between a present statutory power to pay an amount fixed by the employer, since immediate action is necessary, and a future statutory liability to be brought to account afterwards for any error in paying that amount in breach of the law.

The respondents conceded that for wages fixed mala fide no exemption from review could be claimed and that the mere magnitude of the wages paid, relatively to the wages for which the same service was procurable, might be enough in itself to establish bad faith. This admission, I am sure, was rightly made, but it leads to two conclusions. Firstly, the final words of the section are not absolute, but are subject to an implied qualification of good faith—"as the board may bona fide think fit." Is the implication of good faith all? That is a qualification drawn from the general legal doctrine, that persons who hold public office have a legal responsibility towards those whom they represent—not merely towards those who vote for them—to the discharge of which they must honestly apply their minds. Bona fide here cannot simply mean that they are not making a profit

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out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public, whose money and local business they administer.

The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be "contrary to law" and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the auditor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission is to inquire if there is any excess over what is reasonable. I do not find any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism. The breach in the words "as they may think fit," which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness. It might be otherwise, if the express words were to be read as absolute and unqualified, but if they are to be read as subject to some qualification, I think that qualification must be derived from the purpose of the statutory audit, which is the protection of the ratepayers' pockets and not the immunity of spend-thrift administration. Next, in the case and for the purpose assumed, the auditor, when he reviews the accounts, is entitled and bound to use his own judgment as to the wages that would be reasonable under the circumstances. He must do so, in order to measure from that datum the excess of the

wages paid, and to decide if the excess is so great as to evidence mala fides. So it will be also with the Courts of law on appeal. If in the case of bad faith the auditor is capable of finding a reasonable amount and is bound to proceed to do so, I find no words in the section which, on a sound construction, preclude him from doing the same thing when good faith is present, and I think that in both cases the reasonableness of the amounts is a subject for his review.

Though there is not much direct authority on this question, I find none that does not bear out this view of the legislation. As to the duties of an auditor Lord Russell C.J. says in *Thomas* v. *Devonport Corporation* (1): "An auditor is not only entitled, but . . . . bound . . . . to see that there are not amongst the payments . . . . payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper." This is under the Municipal Corporations Act, and Farwell L.J. cites it as equally applicable to an auditor under the Public Health Act, and he observes: *Rex* v. *Roberts* (2): "The auditor does not claim, nor could he (in my opinion) properly claim, to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration." I think these passages excellently illustrate the distinction that must be drawn in such administrative matters. One of the ways in which a payment may be illegal, is, as Lord Russell C.J. says, that it is not within the authority or not in accordance with the duty of the council. By questions of policy I understand Farwell L.J. to mean such matters as the necessity for a urinal and the choice of its position, provided no public or private nuisance is created: *Biddulph* v. *Vestry of St. George*,

(1) [1900] 1 K. B. 16, 21. (2) [1908] 1 K. B. 407, 435.

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Hanover Square (1); *Mason* v. *Wallasey Local Board* (2); and *Vernon* v. *Vestry of St. James, Westminster* (3); and similar questions of policy. The word, however, is policy, not politics, and I can find nothing in the Acts empowering bodies, to which the Metropolis Management Act, 1855, applies, which authorizes them to be guided by their personal opinions on political, economic or social questions in administering the funds which they derive from levying rates. Stirling J. in *Lewis* v. *Weston-super-Mare Local Board* (4) quotes as applicable to the case before him Lord Cranworth's observations in *Stockton and Darlington Ry. Co.* v. *Brown* (5): "when the Legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them bona fide with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose," and the learned judge adds: "the principle stated . . . . may even more readily be applied where the powers are vested in a public corporation charged with the performance of important public duties and acting for the benefit of the whole community." To my mind a council acts for a collateral purpose, if it fixes by standards of its own on social grounds a minimum wage for all adults, and is not in so doing acting for the benefit of the whole community.

Much was said at the Bar about the wide discretion conferred by the Local Government Acts on local authorities. In a sense this is true, but the meaning of the term needs careful examination. What has been said in cases, which lie outside the provisions as to audit altogether, is not necessarily applicable to matters, which are concerned with the expenditure of public money. There are many matters, which the Courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to

(1) (1863) 33 L. J. (Ch.) 411.
(2) (1876) 58 J. P. 477.
(3) (1880) 16 Ch. D. 449.
(4) (1888) 40 Ch. D. 55, 62.
(5) (1860) 9 H. L. C. 246, 256.

borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another. This, however, is not a recognition of the absolute character of the local authority's discretion, but of the limits within which it is practicable to question it. There is nothing about a borough council that corresponds to autonomy. It has great responsibilities, but the limits of its powers and of its independence are such as the law, mostly statutory, may have laid down, and there is no presumption against the accountability of the authority. Everything depends on the construction of the sections applicable. In the present case, I think that the auditor was entitled to inquire into all the items of expenditure in question, to ask whether in incurring them the council had been guided by aims and objects not open to them or had disregarded considerations by which they should have been guided, and to the extent to which they had in consequence exceeded a reasonable expenditure, it was his duty to disallow the items.

The material facts are as follows: The year under review is 1921–1922, and in that year both men and women in Grade A, which, it seems, is the lowest grade, received a wage of 4*l.* a week. There are two tests by which these payments can be criticised. One is the rise or fall in the cost of living, according to the index figures published monthly by the Ministry of Labour in the Labour Gazette, the other is the publication every three months of the rates of wages fixed for various grades of workpeople by the Joint Industrial Council for local authorities' employees in the London district. Neither has any binding authority over the Poplar Council, and no doubt exception can be taken to both. The first is based on careful and extensive statistical inquiries, and has been widely relied on for many years past. The second represents what numbers of employers and employees have been content to pay and to take, following the agreed opinion of representatives on both sides assembled for the purpose. The respondents have not criticised any of

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these figures in detail, or pointed out any errors in them, or put forward any preferable materials. They say simply that they did not think fit to adopt them.

The rate in question—4*l.* a week—was fixed in May, 1920, for Grade A, and in the case of women this was a rise of rather over 30*s.* per week. During five months in 1920–1921, and one in 1921–1922, the men's wages in this grade would have been 4*s.* to 7*s.* 6*d.* higher, if the awards of the Joint Industrial Council had been acted on, and for three months in the former year the cost of living figures had risen above the uniform wage of 4*l.* For women the wage of 4*l.* was never less than 15*s.* above the cost of living figures, and 10*s.* above the Joint Industrial Council's awards. From about the middle of 1920–1921 a fall in the cost of living figures set in, and from the end of the first month in 1921–1922 a fall in the Joint Industrial Council's figures also, and both continued to fall steadily and without any material setback throughout the remainder of the period under review.

The council did not fail to observe this fall, but took it into consideration, and in August, 1921, passed a resolution that wages or bonuses of the council's workmen in all departments be not reduced during the ensuing four months. The anticipatory character of this resolution is significant. It shows how little the respondents proposed to be guided by anything that could be called the market rate of wages. In fact, no reduction had taken place down to the end of the year under review. Under the operation of this general resolution the wages of Grade B (general labourers), which had previously followed and fallen with the awards for the building trade union, a higher class of award than that applicable to Grade B, no longer followed any awards downwards, but remained "stabilised," as it is called, at 80*s.* 6*d.* per week. Thus, as regards Grade B men, for eight months of the year under review, as regards Grade A men for eleven, and as regards Grade A women for the whole year, the council advisedly cut loose from both these modes of fixing fluctuating wages.

Their reason the respondents give as follows: "The council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion as a matter of policy that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decision as to wages."

From this carefully considered answer I think it is plain that the respondents have deliberately decided not to be guided by ordinary economic (and economical) considerations. The first sentence above quoted means that, when the cost of living passes 4*l.* a week, the rate of wages paid will follow it upwards, but, however it may fall, the 4*l.* rate will be stabilised and will stand. There is nothing definite about the statement that a public authority should be a model employer. To whom is it to be a model? If to other public authorities, the council's resolution is vox clamantis in deserto, for other authorities, with rare exceptions, turn a deaf ear to it. If to other private employers, the example of the council is necessarily thrown away on concerns, which must make both ends meet and have not the ratepayers' purse to draw on. Whatever "having regard to the efficiency of their workpeople" may mean, it is not proved or suggested that the workpeople employed in Poplar are in any way exceptional in their powers of work, or that the cost of maintaining a workman's efficiency is higher in Poplar than elsewhere. The one definite thing is that the respondents contend that no adult employee should in any circumstances have less than 4*l.* a week, whether young or old, male or female, married or single, skilled or unskilled. It is not shown that the women's work is the same as, or is comparable with, the men's, or that the women inter se or the men inter se are engaged in equivalent tasks. I express no opinion as to the

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merits of this view, that the dignity of adult labour requires at least a 4*l.* wage, nor has the honesty of those who entertain it been questioned, but I think it is plain that such a course, whether it be ideal or social or political or all three, forms no part of the conduct, as ordinarily understood, of such practical enterprises as borough councils are by statute authorized to engage in. No authority and no statutory provision was cited to your Lordships, which enables a borough council to give practical effect, at the ratepayers' expense, to such an abstract resolution, nor am I for my own part aware of any. I am, therefore, of opinion that on their own showing the respondents have exercised such discretion as the Metropolis Management Act gives to the council in the matter of wages upon principles which are not open to the council, and for objects which are beyond their powers. Their exercise of those powers was examinable by the auditor, and on the above grounds the excess expenditure was liable to be disallowed by him as contrary to law. As to the amount of surcharge little was urged on your Lordships outside the contention that the whole question of the amount of wages to be paid was one for the council alone. The auditor, who had not challenged the wages paid in 1920–21, when it was possible to suppose that they had been fixed with some reference to the cost of living and the current awards, was moved to object to them in 1921–22, when he found that, in the face of an established and rapid decline both in the cost of living and in the amounts awarded, these wages continued to be paid without change. I think he was justified in challenging them in the second year, and that the explanations now given show that his surcharge was right. He caused elaborate calculations to be made, based on a very liberal margin for discretion in the respondents' favour, and only surcharged the excess, and even that excess he reduced to a round figure of 5000*l.*, the amount now surcharged. This is no arbitrary amount or penal sum, and the respondents have been treated by him in this regard with every indulgence. I see no reason to dispute his figures, and am of opinion that the order of the Divisional Court was right and that it ought to be restored.

LORD WRENBURY. My Lords, the metropolitan borough of Poplar is a statutory body in whom is vested a statutory discretion expressed by the following words in the Metropolis Management Act, 1855, s. 62. They "shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit."

The council of the borough during the year in review paid certain wages to their employees. The question in the appeal is not whether they had a discretion as to the wages they should pay—they certainly had; it is not whether in the exercise of that discretion, if exercised within the statutory limits and upon legitimate grounds, they are to be controlled by the Court or by this House—they certainly are not. It is not alleged that the council acted mala fide, neither is it alleged that they were guilty of negligence or misconduct. The question is as to what were the limits of their statutory discretion—whether they exceeded those limits and whether they acted wholly upon grounds which they were entitled to regard.

The accounts of the borough council are by statute to be audited by a statutory auditor. His powers and duties are defined by s. 247 of the Public Health Act, 1875. By s. 247, sub-s. 7, it is enacted that: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person. . . . ."

The statutory auditor in this case surcharged a sum of 5000*l.* upon certain named members of the council. The Divisional Court were of opinion that the surcharge was right.

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The Court of Appeal by a majority reversed that decision. The statutory auditor appeals.

For the decision of the appeal the first and essential step is to ascertain with exactness what are the limits of the statutory discretion. This turns upon the exact meaning of the words in s. 62 of the Act of 1855 : " Such salaries and wages as [they] may think fit." I proceed to examine these words and to state what is, in my opinion, their exact meaning, with a view to ascertaining the limits of the statutory discretion.

The cardinal word upon which emphasis is principally to be laid is the word " wages." Wages are the pecuniary return for services rendered. To determine the proper or true amount which in a given state of facts has been paid or is payable for services rendered is far from easy. It can never be determined with exactness. It is impossible to name in any particular case an amount which if diminished by 1*s.* a week would be too small, and if increased by 1*s.* a week would be too large. But it is possible to name an amount which would certainly be too large—as, for instance, if a charwoman were paid 2*l.* a day. Using my best endeavour to state the matter in general terms, I express it thus :—

Wages in a particular service are such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. The figure to be sought is not the lowest figure at which the service could be obtained, nor is it the highest figure which a generous employer might, upon grounds of philanthropy or generosity, pay out of his own pocket. It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is an addition to wages, and is a gratuity. The authority is to pay not such sum but such wages as they think fit.

I pass from the word "wages" to the words "as [they] may think fit." We have heard argument upon the question whether these words are or are not to be understood as if the word "reasonable" or "reasonably" were inserted, so that the sentence would run "as they reasonably think fit" or "such reasonable wages as they may think fit." Is the verb "think" equivalent to "reasonably think"? My Lords, to my mind there is no difference in the meaning, whether the word "reasonably" or "reasonable" is in or out. I do not myself rely upon the fact that in the Adoptive Acts (for instance, in the Baths and Washhouses Act, 1846) the word "reasonable" is found in the connection "reasonable salaries, wages and allowances" and is not found in the Act of 1855, which is by later legislation made applicable to this borough council. It is difficult to suppose that the Council would have to maintain a different standard as regards reasonable conduct in determining the wages of a man employed under the Baths and Washhouses Act and that of a man employed under some other Act. But if it is the fact that either the statute which does or the statute which does not contain the word "reasonable" must give way to the other, it is not obvious which is the statute which is to give way. I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

Thirdly and lastly, I point to the word "fit." That word means, I think, "fitting" or "suitable." The words "as they think fit" do not mean "as they choose." The measure is not the volition of the person vested with the discretion, it is the suitability or adequacy or fitness of the amount in the reasonable judgment of the person vested with the discretion.

My Lords, I pass on to apply the above principles to the

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facts of this case. In the year 1920–21 the auditor found that the council had adopted a rate of 4*l.* a week as the minimum rate payable both to men and women in the lowest grades of labour. In that year he made no surcharge, but accepted (startling as it may seem) the view that the council had not exceeded the limits of their discretion in paying 4*l.* a week, say, to a charwoman for the class of work in which she is employed.

For the year 1921–22 he made, on June 6, 1923, a certificate of disallowance and surcharge to the amount of 5000*l.* on the ground that to that extent at least the wage charges were unnecessary and unreasonable and therefore items contrary to law.

He arrived at the surcharge of 5000*l.* in the following way: He found that the wage payments ranging upwards from 4*l.* a week were still being maintained in the year 1921–22, notwithstanding that the cost of living had fallen from 176 per cent. in the earlier period to 82 per cent. in the latter period over the cost of living in the year 1914. He found that the wage payments made in the year 1921–22 exceeded by about 17,000*l.* the amount of wages that would have been paid if the agreed wages of the awards made by the Joint Industrial Council had been followed. On May 18, 1923, he had written to Mr. C. W. Key that he adjourned his audit to May 31, and that he would then hear any representations that might be made on the matter of the audit or would consider any representations that might be made to him in writing. At the adjourned audit he heard the parties, gave effect to some of their contentions, reduced the figure of 17,000*l.* to 5000*l.*, and on June 6 certified as above stated a surcharge of 5000*l.* on the ground that the council had made payments far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency and which were thus in reality gifts to their employees in addition to remuneration for their services.

The principle upon which the auditor proceeded was as follows: He started as a basis with the wage current at a past date before the war. For the moment he assumed that

that wage was a fair wage at that date For any error in that respect, allowance was made as presently mentioned. He then took the cost of living, acting upon the principle that if 20*s.* in the year under review was required to purchase commodities which at the date of the basic wage could have been purchased for 10*s.*, the basic wage must be multiplied by two to reproduce in the year of review the basic wage of the past date. He also took as an assistance and guide the bonuses allowed by the Joint Industrial Council's awards. He then arrived at a figure, and to that figure added 20*s.* a week to cover and make allowance for any error by way of insufficiency that might be lurking behind the amount of the estimate. Anything beyond this he regarded as a gift, and made his surcharge on the ground that it was contrary to law for the council to make gifts.

My Lords, the principles upon which the auditor acted are, in my opinion, sound principles.

He further found that, on August 31, 1921, the council had passed a resolution to the effect that no reduction of wage or bonus should be made during the ensuing four months and that this was acted upon for twelve months. He regarded this as not a legitimate exercise of the council's powers. "It disregarded," he says, "very important reductions which had already taken place in the cost of living and in the trade union and other awards and during the period of its operation further important reductions were likely to occur and did in fact occur." In this, again, I think the auditor was right.

The auditor has not proceeded upon the footing that he was bound to trace and state every separate case of overpayment of wage ; he has not certified that A. B. was overpaid 5*s.* in this named week and 10*s.* in that named week and so on. He was not, I think, bound to do so. It would be practically impossible to deal with the matter in that way. He has taken the wages bill as a whole and has certified that a round sum of 5000*l.* (which may well be much below the mark) is a sum which at least has been paid in excess of the sum which would result from a proper and legitimate exercise of the statutory discretion. If he is right in that, as I think

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he is, it follows that the excess payment is within s. 247, sub-s. 7, of the Act of 1875 contrary to law, and in discharge of his statutory duty he was bound to surcharge the amount.

I do not find it necessary to say more than a word upon the argument as to the words "item of account" in s. 247, sub-s. 7. Item of account is not the same as head of account. The wage bill is no doubt a head of account—but every item of weekly payment to each employee is an item of account. If a man's wages were charged for eight weeks and he had been employed only five weeks, the wages for three weeks would be items of account which ought to be disallowed.

My Lords, for the reasons which I have given I think that the three judges in the Divisional Court were right; that Bankes L.J. was right, that Scrutton L.J. would have been right if he had correctly applied to the facts some of the principles which he had stated, and that this Appeal succeeds.

LORD CARSON. My Lords, in the course of the arguments in this case, and indeed afterwards, I felt inclined to concur with the opinion of Scrutton L.J. in the Court of Appeal, which he shortly summarises in the following passage: (1) "I come to the conclusion that for that year, and I limit my conclusions to that year, though the figures are near the line where interference should take place, I cannot find they have reached it. The question is not whether I should have sanctioned these wages; I probably should not: nor whether the auditor or the Whitley Council would have sanctioned these wages; it is for the Poplar Borough Council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body." I can find nothing in the reasoning of the Lord Justice which is at variance with the propositions as I understand them which your Lordships have laid down.

I was also impressed by the judgment of Atkin L.J., where he said, as regards the principle on which limitation should be based on the words of the Metropolis Management

(1) [1924] 2 K. B. 721.

Act of 1855—namely (1), "The answer, I think, is to be found in the restriction that the council must act in good faith. They must determine the amount of wages as wages in an existing industrial system; they must not fix the amount as a dole or as a bribe, or with any object other than that of fairly remunerating the servant," and then he added: "In this case bad faith is not alleged by the auditor or found by the Divisional Court. Indeed, it is stated in the judgment below that it is admitted that the council exercised their discretion honestly." Upon further consideration I do not feel confident that these conclusions can be supported. As regards the question of the exorbitant or excessive nature of the payments made, it seems to me that that is not the only question which we have to determine to see whether the rates paid "are" (to quote Scrutton L.J.) "near the line where interference should take place." As Lord Buckmaster has pointed out, in the joint affidavit of members of the borough council, para. 9, it is stated as follows: "The council did not and does not take the view that wages paid should exclusively relate to the cost of living. They have, from time to time, carefully considered the question of the wages and are of opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople," etc.

That paragraph appears to show that they were acting upon a policy which claimed entirely to disregard the sharp decline in the cost of living and the nature of the labour that had to be paid for. That being so, I find a difficulty in supporting the conclusions arrived at by Scrutton L.J., as I think that not merely the excessive wages paid, but the reasons on which the council claimed to assess them, have to be taken into consideration if we are to deal with the realities of the problem. As regards the reasons already referred to of Atkin L.J., I am inclined to think, upon further consideration, that the admission that bad faith is not alleged

(1) [1924] 2 K. B. 725.

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and that the council exercised their discretion honestly has been misapplied. I do not myself know what these expressions are meant to cover, but, having regard to the statements made in para. 14 of the affidavit of the auditor that the council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers, whose funds they administered, had imposed unreasonable charges upon these funds and made payments which were far in excess of those necessary to obtain the services of those required and to maintain a high standard of efficiency, and which were thus in reality gifts to their employees in addition to remuneration for their services, I find it difficult to come to a conclusion that the admissions referred to meant anything more than that the council honestly thought they were entitled to take the course they did, and in my opinion it was open to the auditor, upon coming to the conclusions as stated in his affidavit, to draw the inference that the council were not engaged in merely fixing a rate of wages, but were affected by considerations which could not be held to come within the ambit of the discretion entrusted to them.

My Lords, having regard to the great unanimity as to principles which has prevailed in all the judgments, both in the Court of first instance and the Court of Appeal, and in the judgments just delivered by your Lordships, with which I in the main agree, I do not find it possible, notwithstanding the doubts I have felt, to dissent from the opinion expressed by the noble Lord on the Woolsack.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 3, 1925.

Solicitors for the appellant: *Last, Riches & Fitton.*
Solicitor for the respondents: *W. H. Thompson.*

[HOUSE OF LORDS.]

MACAURA . . . . . APPELLANT; H. L. (Ir.)* 1925 April 3.

AND

NORTHERN ASSURANCE COMPANY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

Insurance (Fire)—Insurable Interest—One-man Company—Sole Shareholder and Creditor insuring Assets of Company.

Neither a shareholder nor a simple creditor of a company has any insurable interest in any particular asset of the company.

Paterson v. *Harris* (1861) 1 B. & S. 336 and *Wilson* v. *Jones* (1866) L. R. 1 Ex. 193; (1867) L. R. 2 Ex. 139 discussed.

Dictum of Walton J. in *Moran, Galloway & Co.* v. *Uzielli* [1905] 2 K. B. 555, 562 approved.

The owner of a timber estate sold the whole of the timber thereon to a timber company in consideration of fully paid up shares in the company. Subsequently by policies effected in his own name with several insurance companies he insured this timber against fire. The greater part of the timber having been destroyed by fire, he sued the insurance companies to recover the loss, but the actions were stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policies. The claimant was the sole shareholder in the company and was also a creditor of the company to a large extent. The arbitrator held that the claimant had no insurable interest in the goods insured and disallowed the claim:—

Held, (1.) that the claimant had not either as shareholder or creditor any insurable interest in the goods; (2.) that the claimant having allowed the point of want of insurable interest to be raised before the arbitrator without objection, it was not open to him to call in question the authority of the arbitrator to entertain it.

APPEAL from an order of the Court of Appeal in Northern Ireland affirming an order of the King's Bench Division upon an award of an arbitrator stated in the form of a special case.

By an indenture dated December 30, 1919, the appellant, who was the owner of the Killymoon estate in county Tyrone with the timber thereon, agreed to sell to the Irish Canadian Saw Mills, Ld., all the timber, both felled and standing, on the estate for 27,000*l*., to be paid in fully paid up shares of the Canadian company, and in addition the actual cost

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD PHILLIMORE.

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incurred by the appellant in felling the timber already felled, to be paid in cash or shares at the option of the appellant. By a further indenture of the same date the appellant granted to the Canadian company leave and licence for the period of one year to enter upon the estate and to use all mills on the estate for the purpose of sawing the timber thereon. In pursuance of the first indenture of December 30, 42,000 fully paid 1*l.* shares in the Canadian company were allotted to the appellant or his nominees, 27,000 shares in respect of the purchase price and 15,000 shares in respect of the cost of felling the timber. These were the only shares issued by the company, and they had always been held by the appellant or by his nominees for his benefit. Except some chattels of small value, the only assets of the Canadian company were the said timber and the licence granted by the second indenture of December 30, 1919.

In August, 1921, the Canadian company had completely felled and sawn all the timber on the estate, and the saw mills were partially dismantled.

At the time of the policies of insurance hereinafter mentioned the title deeds of the Killymoon estate were deposited with the Bank of Ireland to secure an overdraft by the appellant.

By a policy of insurance dated February 6, 1922, made in the names of the appellant and the bank for their respective rights and interests the respondents, the Northern Assurance Company, insured against fire all timber on the Killymoon demesne not within 100 yards of any saw mill for ten-sixtieths of 30,000*l.* Similar insurances were effected with four other offices, who were also respondents to this appeal.

At the respective dates of the issue of these policies the appellant was a creditor of the Canadian company to the extent of 19,000*l.*

On February 22, 1922, the greater part of the timber on the estate was destroyed by fire.

In June, 1922, the appellant and the bank instituted five actions in the King's Bench Division in Northern Ireland

against the several offices for the recovery of moneys alleged to be due under the policies. But at the instance of the defendants the Court ordered that all proceedings in the actions should be stayed and that the matters in dispute should be referred to arbitration in pursuance of the several conditions in that behalf contained in the policies, and an arbitrator was appointed.

The arbitrator, by an award stated in the form of a special case, awarded (1.) that the appellant had not at any time during the currency of the policies any insurable interest in the timber the subject matter of the policies; (2.) that the timber was not at the time of burning within 100 yards of a saw mill within the meaning of the policies.

No question arose upon the second limb of the award. The Divisional Court upheld the award and their decision was affirmed by the Court of Appeal in Northern Ireland (Andrews and Moore L.JJ.).

1925. March 6, 9. *Serjeant Sullivan K.C.* (of the Irish and also of the English Bar) and *M. F. Healy* (of the Irish Bar) (with them *Ivor Grantham* (of the English Bar)) for the appellant. By obtaining a stay of the actions in order to have the appellant's claims referred to arbitration in pursuance of the terms of the policies the respondents precluded themselves from putting forward any defence which avoided the policies, for the avoidance of a policy involves the avoidance of the arbitration clause which is part of the policy. They were estopped from denying that the policies were valid indemnities against the actual loss sustained: *Jureidini* v. *National British and Irish Millers Insurance Co.* (1); *Ballasty* v. *Army, Navy and General Assurance Association* (2); *Johannesburg Municipal Council* v. *Stewart & Co.* (3); *Yorkshire Insurance Co.* v. *Craine* (4); and see *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (5) Inasmuch as the want of insurable interest

(1) [1915] A. C. 499, 505.
(2) (1916) 50 Ir. L. T. 114, 116.
(3) (1909) 47 S. L. R. 20, 23.
(4) [1922] 2 A. C. 541, 547.
(5) [1917] 2 K. B. 433, 436, 438.

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is a question going to the root of the contract the arbitrator had no jurisdiction to entertain it.

[LORD BUCKMASTER. No question of estoppel was before the Court of Appeal in Northern Ireland. The appeal was upon the award, not against the arbitration. There was no appeal on the ground that the arbitrator had no power to make the award. Therefore this point is not open to the appellant.]

Assuming that the arbitrator had power to deal with this question, he was wrong in holding that the appellant had no insurable interest in this timber. Legal ownership is not necessary for insurable interest. So to confine it would be adding a restriction to a contract of insurance which does not arise out of its nature. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. If there is a legal certainty of loss arising from the destruction of the property insured then there is an insurable interest: *Lucena* v. *Craufurd* (1); *M'Swiney* v. *Royal Exchange Assurance* (2); *Lloyd* v. *Fleming* (3); *Ebsworth* v. *Alliance Marine Insurance Co.* (4); *Inglis* v. *Stock.* (5) This is a case of a sole shareholder dealing with property created by his money, and there can be no question that he has a serious interest in fact in this property; the only question is whether he has an insurable interest in it. A shareholder in a company is entitled to insure the goods of the company to the extent of his holding in order to protect the value of his shares: *Paterson* v. *Harris* (6); *Wilson* v. *Jones.* (7) Further, in the special circumstances of this case, the appellant had an insurable interest in this timber as creditor of the company, for he was the only substantial creditor and the company had no other assets out of which the debt could be paid. It is settled that a creditor may

(1) (1806) 2 Bos. & P. N. R. 269, 302.
(2) (1849) 14 Q. B. 634, 645, 646, 659.
(3) (1872) L. R. 7 Q. B. 299, 302.
(4) (1873) L. R. 8 C. P. 596, 609.
(5) (1885) 10 App. Cas. 263, 270.
(6) 1 B. & S. 336.
(7) L. R. 1 Ex. 193, 198; L. R. 2 Ex. 139, 146, 150.

insure his debtor's life to the extent of his debt, because of the probability that if the debtor continues to live he will earn the money to pay the debt: *Godsall* v. *Boldero*. (1) To succeed, the creditor must prove that the loss was at all material times inevitable, but the appellant has discharged that onus. The dictum of Walton J. in *Moran, Galloway & Co.* v. *Uzielli* (2), which may appear to be opposed to the appellant's claim qua creditor, proceeds on the view that the creditor in that case had failed to prove that his debtor, a shipowner, was unable to pay the debt unless he recovered the ship. The appellant was bound to benefit by the preservation of the subject matter of the insurance and bound to suffer loss by its destruction, and the actual loss both of the amount of his debt and of the value of his shares was the direct and inevitable result of the happening of the peril. He is therefore entitled to recover on the policies.

[Counsel also referred to *Barclay* v. *Cousins* (3); *Crowley* v. *Cohen* (4); *Marks* v. *Hamilton* (5); *Waters* v. *Monarch Life Assurance Co.* (6); *London and North Western Ry. Co.* v. *Glyn* (7); *Anderson* v. *Morice* (8); *Colonial Insurance Company of New Zealand* v. *Adelaide Marine Insurance Co.* (9)

Sir John Simon K.C., S. L. Brown K.C., E. S. Murphy K.C. and *W. Lowry* (the last three of the Irish Bar) for the respondents were not called upon.

The House took time for consideration.

1925. April 3. LORD BUCKMASTER. My Lords, the appellant is the owner of the Killymoon estate in the county of Tyrone. The respondents are five insurance companies with whom at various dates in January and February of 1922, the appellant effected insurance against fire on timber and wood goods in the open situate on the Killymoon domain not within a hundred yards of any saw mill or any building

(1) (1807) 9 East, 72.
(2) [1905] 2 K. B. 555, 562.
(3) (1802) 2 East, 544.
(4) (1832) 3 B. & Ad. 478, 485.
(5) (1852) 7 Ex. 323.
(6) (1856) 5 E. & B. 870.
(7) (1859) 1 E. & E. 652.
(8) (1876) 1 App. Cas. 713.
(9) (1886) 12 App. Cas. 128.

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in which wood working by power other than wind or water was carried on. Neither the amounts nor the exact language of the policies are material for the purposes of the present appeal, nor is the fact that the policies were really effected in the name of the appellant and the Governor and the Company of the Bank of Ireland, for the real questions that arise for determination are these :

1. Whether the appellant had any insurable interest in the goods the subject of the policies, and

2. Whether the respondents were, in the circumstances, at liberty to raise the contention that he had no such interest in the manner in which it was raised in the course of these proceedings.

The history of the matter can be stated in a few sentences. The appellant upon whose estate the timber in question was originally standing on December 30, 1919, assigned the whole of it to a company known as the Irish Canadian Saw Mills, Ld., the amount to be paid for the timber felled and unfelled being 27,000*l.*, while a further 15,000*l.* was to be paid for the cost incurred by the appellant in felling the timber that was then down. The total price paid was therefore 42,000*l.*, satisfied by the allotment to the appellant or his nominees of 42,000*l.* fully paid 1*l.* shares in the company ; no further shares than these were ever issued. The company proceeded with the operations of cutting the timber, and by the end of August, 1921, it had all been felled and sawn up in the saw mills. In the course of these operations the appellant had become the creditor of the company for 19,000*l.*, and beyond this it is stated that the debts of the company were trifling in amount. The timber when cut remained lying on the appellant's land, and on February 22, 1922, the greater part of it was destroyed by fire. The appellant accordingly claimed against the companies upon the policies and, on May 30, 1922, in an answer sent on behalf of all the companies, it was stated that the companies must decline to accept liability for the loss of any timber within a hundred yards of the saw mill. The appellant and the Bank of Ireland accordingly instituted

proceedings by issuing writs against each of the respondent companies, and each of the statements of claim delivered contained the following allegation: "3. The plaintiffs were at the date of the effecting of the said policy of insurance and at the time of the loss and damage hereinafter mentioned interested in the said timber to the amount so insured thereon as aforesaid."

On production of the policies all these actions must have been dismissed, since each policy contained a clause referring all disputes to arbitration and making the award of the arbitrator a condition precedent to any liability on the part of the companies. Instead of pleading this as a defence the companies applied to stay the actions and refer the matters in dispute to arbitration, and on July 21, 1922, an order was made to that effect. Upon the hearing of the arbitration several charges of fraud and dishonesty were made against the appellant, all of which failed, and upon the point initially raised in the letter to which reference has been made the arbitrator decided in the appellant's favour, but he held that in the circumstances the appellant had no insurable interest in the timber, and this view has been supported in the Court of King's Bench and in the Court of Appeal.

The question as to the competency of the arbitrator to determine the dispute as to the insurable interest of the plaintiff only arises if no such insurable interest can be recognized by the law, and it is this point therefore that first requires consideration. It must, in my opinion, be admitted that at first sight the facts suggest that there really was no person other than the plaintiff who was interested in the preservation of the timber. It is true that the timber was owned by the company, but practically the whole interest in the company was owned by the appellant. He would receive the benefit of any profit and on him would fall the burden of any loss. But the principles on which the decision of this case rests must be independent of the extent of the interest held. The appellant could only insure either as a creditor or as a shareholder in the company. And if he was not entitled

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in virtue of either of these rights he can acquire no better position by reason of the fact that he held both characters. As a creditor his position appears to me quite incapable of supporting the claim. If his contention were right it would follow that any person would be at liberty to insure the furniture of his debtor, and no such claim has ever been recognized by the Courts. It is true that since the case of *Godsall* v. *Boldero* (1), where a creditor of Mr. Pitt was held entitled to effect an insurance upon his life, this interest of a creditor has always been recognized as sufficient to support a life policy, but this depends, as was said by Lord Ellenborough, upon the means and probability of payment which the continuance of a debtor's life affords to his creditors and the probability of loss which would result from his death. In the case of *Moran, Galloway & Co.* v. *Uzielli* (2), where a creditor for ships' necessaries was held entitled to insure the ship, the decision rested upon the fact that the creditor had a right in rem against the vessel, and the learned judge said that "in so far as the plaintiffs' claim depends upon the fact that they were ordinary unsecured creditors of the shipowners for an ordinary unsecured debt, I am satisfied that it must fail. The probability that if the debtor's ship should be lost he would be less able to pay his debts does not, in my judgment, give to the creditor any interest, legal or equitable, which is dependent upon the safe arrival of the ship." This is, in my opinion, an accurate statement of the law, and the appellant therefore cannot establish his claim as creditor.

Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus

(1) 9 East, 72. (2) [1905] 2 K. B. 555, 562.

assets when the company is wound up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset—a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity. This difficulty was realized by counsel for the appellant, who really based his case upon the contention that such a claim was recognized by authority and depended upon the proper application of the definition of insurable interest given by Lawrence J. in *Lucena* v. *Craufurd*. (1) I agree with the comment of Andrews L.J. upon this case. I find equally with him a difficulty in understanding how a moral certainty can be so defined as to render it an essential part of a definite legal proposition. In the present case, though it might be regarded as a moral certainty that the appellant would suffer loss if the timber which constituted the sole asset of the company were destroyed by fire, this moral certainty becomes dissipated and lost if the asset be regarded as only one in an innumerable number of items in a company's assets and the shareholding interest be spread over a large number of individual shareholders. The authorities which have the closest relation to the present are those of *Paterson* v. *Harris* (2) and *Wilson* v. *Jones*. (3) In the first of these cases a shareholder in a company that was established for the purpose of laying down a submarine cable between the United Kingdom and America, effected an insurance upon his interest in the cable. The shareholder's insurable interest in the cable does not appear to have been disputed and the real question, therefore, was never argued. In the case of *Wilson* v. *Jones* (3), where another policy was effected by a shareholder in the same company, it was distinctly held that the policy was not upon

(1) 2 Bos. & P. N. R. 269, 302. (2) 1 B. & S. 336.
(3) L. R. 1 Ex. 193; L. R. 2 Ex. 139.

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the cable but upon the shareholder's interest in the adventure of the cable being successfully laid. It was attempted by the underwriters to limit the insurance to an interest in the cable itself, which would have lessened the risk, but it was held that this was not the true construction of the policy. It was not argued that, if it were, the shareholder had no interest to insure, but both Martin B. in the Court of Exchequer and Willes J. in the Exchequer Chamber, stated that the plaintiff had no direct interest in the cable as a shareholder in the company, and, so far as I can see, this consideration it was that assisted the Court in determining that the insurance was upon the adventure in which the shareholder had an interest, and not upon the cable in which he had none. There are no other cases that even approximately approach the present case, and, properly regarded, I think the case of *Wilson* v. *Jones* (1) is against and not in favour of the appellant's contention. Upon the merits of this dispute, therefore, the appellant must fail. Neither a simple creditor nor a shareholder in a company has any insurable interest in a particular asset which the company holds.

Nor can his claim to insure be supported on the ground that he was a bailee of the timber, for in fact he owed no duty whatever to the company in respect of the safe custody of the goods; he had merely permitted their remaining upon his land.

The remaining contentions can be briefly dealt with. The letter of May 30 certainly created no estoppel, nor did the application to refer to arbitration. Whether the arbitrator had power without consent to determine that the policy was void because of lack of insurable interest does not appear to me to arise. The time for the appellant to take this objection was when the order for reference was made, for one of the allegations in issue was the statement that he possessed an insurable interest; nor is there any substance in the contention that he was led by the defendants to believe the only question to be referred was the construction of the policy.

(1) L. R. 1 Ex. 193; L. R. 2 Ex. 139.

In any event a further opportunity was offered to him upon the question being raised before the arbitrator, for he could then have raised his contention on an application to stay the arbitration; but, in fact, the point was fully argued before the arbitrator, who was asked by appellant's counsel to state a case upon it. On December 13, 1922, the appellant served a notice of motion seeking to have the award set aside, and on January 8 a further notice of motion was served adding as an additional ground for relief that the arbitrator's jurisdiction was terminated by repudiation of the policy on the grounds of fraud put forward by the defendants. The notice of motion is not in the documents before the House, but it would appear from this statement that neither notice of motion raised the particular point that is now relied upon. The Court of the King's Bench Division decided against the appellant, and his notice of appeal to the Court of Appeal asked only the following relief, namely: that question No. 1 in the award should be answered in the affirmative and question No. 2 in the negative and the judgment of the King's Bench should be reversed. Now, question No. 1 was the question as to whether the appellant had any insurable interest in the timber, and it was this question which the appellant himself invited the Court of Appeal to decide in his favour. After this it is impossible for him to say that there is no proper decision upon the matter and that the whole proceedings are void. Nor did he raise again by his notice to the Court of Appeal the question that the arbitrator's jurisdiction was terminated by the charges of fraud. It would, indeed, have been foolish to do so, for those questions were all decided in his favour. The question therefore as to the authority of the arbitrator to decide the point as to insurable interest is no longer open to the appellant, but if it were, I agree with the views expressed upon it by Moore L.J. in the Court of Appeal. For these reasons I am of opinion that this appeal must fail and should be dismissed with costs.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been

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delivered by my noble and learned friend on the Woolsack. I approve of it and have nothing to add.

LORD SUMNER. My Lords, this appeal relates to an insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmills, Ltd., of Skibbereen, co. Cork. He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no "legal or equitable relation to" the timber at all. He had no "concern in" the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire.

No authority has been produced for the proposition that the appellant had any insurable interest in the timber in any capacity, and the books are full of decisions and dicta that he had none. *Paterson* v. *Harris* (1) and *Wilson* v. *Jones* (2) are very special cases, and neither is in point here. In the former there was no plea traversing the allegation that the plaintiff had an insurable interest. The Court, construing the policy as one really expressed to be on the cable, dealt with the case as one in which interest was admitted therein, but its decision of the case after this admission of interest is not a decision that a shareholder as such has an insurable interest in a company's assets themselves. In the latter, where the policy described the subject-matter of the insurance in a very obscure manner, it was held that the shareholder insured had an interest that he could insure in the profits of

(1) 1 B. & S. 336. (2) L. R. 2 Ex. 139.

the adventure so described, but it was expressly stated that he had no such interest in his shares in the company.

There remains the contention that the respondents were incompetent to raise the absence of insurable interest upon the arbitration. This seems to me to be a pure misapprehension. It is said that the defendants could not have got the order, which stayed the action and referred the matter in dispute to arbitration, if they had stated that they meant to rely on this point or, rather, if they had not actually intimated that they would not. The argument rests on the contention that to put the plaintiff to proof of an insurable interest is the same thing as pleading the Gaming Act, and saying that the policy is null and void and that there is no contract for arbitration or anything else, but in truth the defendants have said no such thing. The letters written before the order was made did not, either affirmatively or negatively, show anything of the kind. The plaintiff had averred an insurable interest in his pleading. The defendants, who moved for a stay before putting in a defence, simply denied liability, and the issue so raised was the matter in dispute. The case of *Jureidini* (1) is not in point. There persons, who had repudiated the whole contract of insurance, afterwards relied on a limited arbitration clause contained in it, which required the amount payable to be determined by arbitration, and said that, until he had obtained such an award, the plaintiff could not complete his case. It was held that the defendants could not both repudiate the contract in toto and require the performance of a part of it, which only became performable when liability was admitted or established. The present case is the converse. Here an arbitration and award are conditions precedent to any action to enforce the policy. The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary, they rely on it and say that, according to its terms, express and implied, they are relieved from liability: see *Stebbing's* case (2); *Woodall* v. *Pearl Assurance Co.* (3) It is a

(1) [1915] A. C. 499. (2) [1917] 2 K. B. 433.
(3) [1919] 1 K. B. 593.

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fallacy to say that they assert the policy to be null and void. They do not plead or mention the Gaming Act, and have no need to rely on it. The contract made in the policy was that, if the plaintiff could prove, among other things, that he had, at the time of loss, such an insurable interest in the timber as the law recognizes, the insurers would pay, and not otherwise. No gaming contract was ever made, nor any agreement to pay, interest or no interest. It is we who would make the contract a gaming contract, if we were to accept the appellant's contention. The respondents say, and truly say, that a fire insurance policy is not an aleatory contract, but is a contract of indemnity, under which the assured must aver and prove interest at the time of the loss. This is a part of the law of insurance, quite independently of the Gaming Act, though the consequence of failure to prove interest is the same —namely, that the policy is unenforceable by an uninterested assured. It was open to the defendants to raise this case at any time. Under the policy arbitration was the only legal proceeding open, and the order was made as a matter of course. The insurers gave up nothing in consideration of getting the order, and all the defences remained open to them. Estoppel has been mentioned, but there was none. The defendants did not make any representation, and the plaintiff did not change his position on the faith of one. The case of *Yorkshire Insurance Co.* v. *Craine* (1) is distinguishable. It is a case in which, under very special circumstances, the appellants were held to have estopped themselves by their conduct from claiming to rely on one of the conditions in a policy (p. 553). Here I can find no conduct which disentitles the defendants to raise any defence, of which the case admits. I also agree with the Courts below that the appellant allowed the point of absence of interest to be taken before the arbitrator and, without moving to discharge the order of reference, went on and took his chance of success, and, further, that there is nothing now before your Lordships except the determination of the questions stated by the learned

(1) [1922] 2 A. C. 541.

arbitrator in his award. A motion to set the award aside failed, and has not been appealed. My Lords, I think this appeal fails.

LORD WRENBURY. My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation. Further, I have read and concur in the judgment delivered by my noble and learned friend, Lord Sumner. I think the appeal should be dismissed.

LORD PHILLIMORE. My Lords, I concur.

Order of the Court of Appeal in Northern Ireland affirmed, and appeal dismissed with costs.

Lords' Journals, April 3, 1925.

Solicitors for the appellant: *Herbert Z. Deane & Co.*

Solicitors for the respondents: *Bircham & Co., for Hoey & Denning, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 May 18.

ARAMAYO FRANCKE MINES, LIMITED Appellants;

AND

ECCOTT . . . . . Respondent.

Revenue—Income Tax—Company incorporated in England—Residence—Trade carried on Abroad by Local Board—Trade carried on partly in England—Concurrent Assessments on Local Board in Name of Agents and on Company—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, Cases I. and V.*

An English company owned and worked mines in Bolivia, and since 1917 the Bolivian business of the company had been managed and controlled by a local board of directors, who consigned the produce of the mines to a firm of London agents to sell on commission in the United Kingdom. On an appeal by the company against an assessment to income tax under Case I. of Sch. D, the Special Commissioners found that the trade of the company was partly carried on in the United Kingdom, but discharged the assessment as unnecessary by reason of a subsisting assessment made by the Special Commissioners upon the Bolivian local board in the name of the London agents:—

Held, that the assessment on the local board in the name of the London firm was invalid, as the firm were not the agents of the local board, but of the company; that the company resided in England and carried on business by its agents partly in this country, and that it was therefore properly assessed under Case I. of Sch. D.

Decision of the Court of Appeal [1925] 1 K. B. 86 affirmed.

Appeal from an order of the Court of Appeal (1) affirming an order of Rowlatt J.

The Aramayo Francke Mines, Ld., was a company registered in this country. Its main business consisted in working mines in Bolivia and marketing the produce of the mines by its agents in this country. In March, 1917, special resolutions were passed and confirmed by the company altering the articles of association so as to transfer the entire control and management of the company's Bolivian business to a local board of directors in Bolivia. This local board employed a London firm, Messrs. Avelino Aramayo & Co., the company's

* *Present:* Viscount Cave L.C., Lord Dunedin, Lord Wrenbury, Lord Phillimore, and Lord Carson.

(1) [1925] 1 K. B. 86.

former agents, to act as commission agents to sell the produce of the mines in the United Kingdom.

The company in reply to a notice served on them in April, 1917, requiring a return of income tax under Sch. D, made a nil return, and further requested the Special Commissioners to deal with the matter. The Special Commissioners, on the footing that the trade was being partly carried on in this country, made an assessment upon the local board as being a non-resident person in the name of its agents, Avelino Aramayo & Co.

Avelino Aramayo & Co. appealed on the ground that the trade was not exercised in the United Kingdom either by the company or by the local board, and that Avelino Aramayo & Co. were not the agents of the local board, so as to be assessable to income tax under s. 41 of the Income Tax Act, 1842, but were excepted therefrom by sub-s. 6 of s. 31 of the Finance (No. 2) Act, 1915, as being brokers and general commission agents. The Special Commissioners confirmed the assessment, but stated a case for the opinion of the Court.

While the settlement of the case was under consideration the Inland Revenue Commissioners applied to the firm for payment of the duty and, on their refusal to pay, an information was instituted by the Attorney-General against the firm to recover the amount.

In the course of correspondence in regard to the information the firm objected that the assessment must be treated as a nullity ab initio, because the requirement for the exercise by the Special Commissioners of their powers of assessment under s. 131 of the Income Tax Act, 1842, had been made by the company and not by the local board on their behalf. The surveyor of taxes then obtained an assessment by the Special Commissioners upon the company in respect of the year 1917–18, and it was this assessment in respect of which the present appeal was brought.

The company appealed against this assessment, and the evidence given on the previous appeal of Avelino Aramayo & Co. was by agreement used for the purposes of this appeal. The Special Commissioners were of opinion that a trade was

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exercised in the United Kingdom, but they discharged the assessment on the ground that there was no reason for assuming that the previous assessment was not valid, and they stated a case for the opinion of the Court.

All three matters came before Rowlatt J., who decided that some trade was being exercised by the company in the United Kingdom. Upon the appeal of Avelino Aramayo & Co. in respect of the assessment upon them as agents for the local board he held that a board of directors could not be assessed in respect of the company's trading profits, whether in the name of the agents or otherwise, and he therefore discharged the assessment. Upon the appeal of the Crown in respect of the assessment upon the company he held that the previous invalid assessment did not affect the validity of the assessment subsequently made upon the company and he accordingly confirmed this assessment. He also gave judgment for the Crown upon the information.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) affirmed the decision of the learned judge in respect of both assessments, but reversed his decision in respect of the information by the Attorney-General.

The arguments in support of the appeal are fully reported in the report of the case before the Court of Appeal. Counsel for the respondents were not called on.

1925. May 14, 18. *Edwardes Jones K.C.* and *Hildesley* for the appellants.

Sir Douglas Hogg A.-G., Sir Thomas Inskip S.-G. and *R. Hills* for the respondents.

VISCOUNT CAVE L.C. My Lords, this appears to me to be a very plain case. The facts have been stated by Rowlatt J. and by the Court of Appeal, and it will be sufficient for me to state the grounds on which I agree with the conclusions at which the Court of Appeal arrived.

The first assessment—the assessment associated with the name of Mr. Ogston, the surveyor of taxes, who was responsible for it—was in my opinion clearly bad. It was an assessment

made on the local board in Bolivia of the appellant company. The local board had, of course, no corporate existence, and were merely the agents in Bolivia of this British company. The assessment was served on the firm of Avelino Aramayo & Co., who were the agents in England, not of the local board, but of the principal of the local board—namely, the appellant company itself. The assessment also passed by the fact that, while for some purposes the company had no doubt a residence in Bolivia, because by the special resolutions the general management of its affairs had been transferred to that country, yet it could also have, and in fact did have, a residence in England. For these reasons—and apart from the circumstance that the request to be assessed by the Special Commissioners had been made, not by the local board or by the London agents, but by the company itself—the first assessment was as bad as it could be ; and I think that the Commissioners should have so held. That assessment, therefore, falls to the ground ; and I agree with the Court of Appeal that the information, which was founded on that assessment, falls with it.

I now come to the second assessment, which is associated with the name of Mr. Eccott, an inspector of taxes. In my opinion that second assessment was clearly good. It was made by the Special Commissioners upon the company, which had elected for that method of assessment. The company is a British company and, as has been admitted at the Bar, has a residence in this country. It has been found, in a manner which I will explain in a moment, that the trade of the company was at all events partly carried on in this country during the period of assessment. That was found in this way : By the first special case, which was made evidence in the second case, the facts were found, and those facts were to the effect that the London firm of Avelino Aramayo & Co. were not mere commission agents but were the general agents of the company in this country, that the produce of the company was marketed by them here, and that they did here perform other services for the appellant company. That is a very concise statement of the findings—perhaps not a fully

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complete statement, but sufficient for the present purpose. On the hearing of the appeal against the second assessment by the Commissioners they referred to that finding, and they referred to it in this way. They said, "We the Commissioners who heard the appeal, although of the same opinion as our colleagues that a trade was being carried on in the United Kingdom by the duly authorized agent of the local board of the appellant company," and then other findings follow. That appears to me to be a clear finding of fact, in the course of the appeal against the second assessment, that the trade of the company was at all events partly carried on in this country. It is common ground that, if it was so carried on, it was carried on by the firm of Avelino Aramayo & Co.; and there can be no doubt on the findings in the two cases that that firm were the agents, not for agents of the company—namely, the local board in Bolivia—but for the company itself. The inference is perfectly clear that the company itself did by its agents carry on its business partly in this country. Of course, if that is so, there is an end of the case, and it is quite plain that the company were assessable under Case I. of Sch. D. They have been assessed under that Case by the Commissioners whom they had chosen as the assessing body, and I can see no possible objection to that second assessment.

It is said that there was here an assessment which is void as a double assessment on the same persons. I do not think so. The first assessment was an assessment upon different persons altogether. It was an attempt to assess the local board in the name of the firm as agents of the local board. That assessment was invalid and void; and therefore the second assessment, which was made upon the company itself and within the time allowed by the statute for the purpose, was a good assessment, and in my opinion it must stand.

I agree on every point with the decision of the Court of Appeal, and I move your Lordships that this appeal be dismissed with costs.

LORD DUNEDIN. My Lords, I concur.

LORD WRENBURY. My Lords, I agree.

LORD PHILLIMORE. My Lords, I agree.

LORD CARSON. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 18, 1925.

Solicitors for the appellants: *Dale & Co.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

FORSIKRINGSAKTIESELSKABET NATIONAL (OF COPENHAGEN) . . } APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Insurance (Fire)—"Fire insurance business"—Reinsurance—Foreign Company—Deposit with Paymaster-General—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, 23.

The business of reinsuring fire risks is fire insurance business within the meaning of the Assurance Companies Act, 1909. Accordingly a foreign company which carries on the business of reinsurance of fire risks in the United Kingdom, but does not otherwise carry on insurance business in this country, is bound to deposit with the Paymaster-General the sum prescribed by s. 2, sub-s. 1, of the Act.

APPEAL from an order of the Court of Appeal (1) affirming an order of Branson J. (2)

The appellants were a Danish company, who carried on the business of reinsurance of fire risks within the United

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD BUCKMASTER, LORD PHILLIMORE, and LORD CARSON.

(1) (1924) 93 L. J. (K. B.) 679. (2) [1924] 1 K. B. 366.

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Kingdom, but did not otherwise carry on insurance business in this country.

By an information dated June 6, 1922, the respondent claimed penalties under s. 23 of the Assurance Companies Act, 1909, for the failure of the appellants to deposit with the Paymaster-General the sum of 20,000*l.* as required by the Act.

The appellants contended that the Act did not apply to reinsurance business, and by way of illustration of the type of business which they carried on they put in evidence a reinsurance treaty made between the appellants and the London and Scottish Assurance Corporation. This treaty and the relevant provisions of the Act are set out in the opinion of the Lord Chancellor.

Branson J. held that the appellants carried on fire insurance business within the meaning of the Act and gave judgment for the Crown for a penalty of 50*l.*, and the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) affirmed this judgment.

1925. April 28, 30. *Sir John Simon K.C.* and *Blake Odgers* for the appellants. The Assurance Companies Act, 1909, does not apply to companies which carry on reinsurance business only and have no relations with the general public. Upon the true construction of s. 1 (*b*) the appellants neither issue, nor undertake liability under, policies of insurance against loss by or incidental to fire. The Act was intended to confer on policy holders in the case of fire and other insurance the protection already accorded in the case of life insurance under the Life Assurance Companies Acts, 1870 and 1872. The interest protected by a reinsurance policy is not the same as the interest on the original policy, but is the interest of the underwriters.

[They referred to *Glasgow Assurance Corporation* (*Liquidators*) v. *Welsh Insurance Corporation* (1), and to the definition of "policy of insurance" in s. 91 of the Stamp Act, 1891.]

Sir Douglas Hogg A.-G., Sir Thomas Inskip S.-G. and *Bowstead* for the respondent were not called on.

(1) 1914 S. C. 320.

VISCOUNT CAVE L.C. My Lords, the question to be determined upon this appeal is whether the appellant company, a Danish company, which carries on in the United Kingdom the business of reinsurance, and no other business, comes within the operation of the Assurance Companies Act, 1909, and so is bound to make the deposit of 20,000*l.* required under that Act.

The Act provides by the first section that it "shall apply to all persons or bodies of persons, whether corporate or incorporate" (I leave out words which are not for the moment material), "and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any" of the five classes there specified. One of those classes is "(*b*) Fire insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire." The Act applies to companies whether established within or without the United Kingdom which carry on business of that class within the United Kingdom; and therefore the fact that the company in this case is a Danish company makes no difference to the result.

Now the nature of the business carried on by the appellant company is best illustrated by reference to the reinsurance treaty, as it is called, which has been put in evidence; and it is only necessary to refer to the first section of that treaty. The treaty is entered into between the London and Scottish Assurance Corporation, Ld., which is there called the ceding office, of the first part, and the appellant company, which is there called the reassuring office, of the other part, and by the first section of the treaty "the ceding office undertakes to cede as from the 1st April, 1921, to the reassuring office a share" there specified "under insurances accepted or renewed by or on behalf of the ceding office" on certain property there also specified, "and the reassuring office unconditionally accepts liability for all reinsurances ceded to it under" the treaty.

That being the nature of the business of the appellant company, does the company carry on a business which can

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be described as "the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire"? That question has been answered by Branson J. and the Court of Appeal in the affirmative, and I cannot see my way to differing from that decision. It appears to me that there is much to be said for the view that a reinsurance treaty of the nature which I have described, when supplemented by a bordereau, is in effect a policy of insurance against loss by or incidental to fire. Apart from the special rules relating to marine insurance, there is no magic in the word "policy." In substance the expression seems to cover a contract of insurance. Now it is old law that by a contract of reinsurance the reinsuring party insures the original insuring party against the original loss, the insurable interest of the original insuring party being constituted by its policy given to the original assured. In that view the company does under a treaty of this character issue to the ceding office what is in effect a policy of insurance against loss by or incidental to fire. It is, I think, upon that ground that Atkin L.J., and to some extent the other learned Lords Justices, base their decision; but apart from that view, and even on the assumption that the reinsurance treaty is in no sense a policy, still I think it remains true that the reinsuring company does at least undertake liability under fire policies. True, it does not become directly liable to the original householder who insures against fire, but it does undertake with the ceding office to take over a part of its liability under those policies.

Your Lordships' attention has been called to certain expressions in the statute, or in the schedules to the statute, which refer not only to insurances but to reinsurances, but it does not appear to me that those passages really affect the conclusion to which I have come upon the terms of s. 1 of the Act of 1909; and indeed one of the schedules, the Fifth Schedule, when read with s. 6 of the Act, appears to me to show that the statute itself treats the expression "assurance" as including not only assurance but reassurance also.

On the whole, my Lords, I find myself in entire agreement with the decisions of the Courts below, and I move your Lordships that this appeal be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. I think the word "under" in this section is equivalent to "in respect of," and as regards the policy of the statute I think it comes to no more and no less than this: "You that dabble in insurance business shall deposit a certain sum to give partial security that you shall pay your debts."

LORD BUCKMASTER. My Lords, I agree.

LORD PHILLIMORE. My Lords, I concur.

LORD CARSON. My Lords, I also agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 30, 1925.

Solicitor for the appellants: *W. G. A. Edwards.*
Solicitor for the respondent: *The Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 May 14.

ALIANZA COMPANY, LIMITED . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Corporation Profits Tax—British Company resident in England —Trade wholly carried on Abroad by local Board of Directors—Liability of Company to Tax—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *ss.* 52, 53.

Corporation profits tax is imposed by s. 52 of the Finance Act, 1920, upon (inter alia) "the profits of a British company carrying on any trade or business" without any limitation as to where the trade or business is carried on, and therefore the tax is leviable upon the whole of the profits of a British company which carries on a trade or business wholly outside the United Kingdom, although the company is not liable to be assessed to income tax under Case I. of Sch. D upon the profits of the trade or business.

The operation of s. 52, which imposes the tax, is not in any way limited or affected by s. 53, sub-s. 2, which is a mere computation section.

Mitchell v. *Egyptian Hotels, Ld.* [1915] A. C. 1022 distinguished.

Saxone Shoe Co. (France), Ld. v. *Inland Revenue* 1923 S. C. 734 approved and followed.

Decision of the Court of Appeal [1924] 1 K. B. 870 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts, which are fully set out in the report before the Court of Appeal, may be shortly summarized as follows:—

The appellant company was incorporated under the Companies Acts in 1903. The objects included the taking over of the business of another company and the carrying on of the business of manufacturers and exporters and dealers in nitrates, iodine, and other products.

Until 1918 the company carried on its trade in such a manner as to be assessed to income tax in respect of the profits arising therefrom under the First Case of Sch. D, the trade being exercised wholly or partly in the United Kingdom by

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD WRENBURY, LORD PHILLIMORE, and LORD CARSON.

(1) [1924] 1 K. B. 870. (2) [1923] 2 K. B. 760.

reason of its being controlled here. In 1918 the company altered its articles of association with the object of removing the control to South America, and for this purpose established a local board of directors in Chile to which the exclusive power of controlling the operations of the company in South America, including the working of the nitrate properties and the disposal of the nitrate, was assigned. The profits were retained and distributed in South America except those required for dividends payable to shareholders resident in the United Kingdom. The company maintained a registered office and secretary in the United Kingdom.

It was admitted that since January 1, 1919, the head and seat and controlling power of the appellant company had been situate in Chile, that the facts were not distinguishable from those dealt with in the case of *Mitchell* v. *Egyptian Hotels* (1), and that in view of the decision in that case the profits and gains of the appellant company were not assessable to income tax under Case I. of Sch. D. It further followed that for income tax purposes the company would be assessable under the Fifth Case of Sch. D, the trade carried on wholly abroad being a possession out of the United Kingdom, but only in respect of profits remitted to the United Kingdom.

The company was assessed by the Commissioners of Inland Revenue to corporation profits tax under Part V. of the Finance Act, 1920, in respect of an accounting period of twelve months ending December 31, 1920, and the whole of the profits arising from the trade of the company in South America were brought into account for the purpose of the assessment as being profits of the company within s. 52, sub.-s. 2 (*a*), of the Act.

The company appealed to the Special Commissioners, who confirmed the assessment.

The Commissioners were satisfied that the appellant company was a British company carrying on a trade or business through its local board in Chile, and they considered that though the profits of that trade or business were not assessable to income tax under Sch. D because the trade or

(1) [1915] A. C. 1022.

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business was carried on wholly outside the United Kingdom they were chargeable to corporation profits tax, and that for the purpose of assessment to that tax they must be determined on the same principles on which the profits of a trade carried on wholly or in part in the United Kingdom would be determined for the purpose of assessment to income tax under Case I. of Sch. D.

Rowlatt J. affirmed the determination of the Special Commissioners, and his decision was affirmed by the Court of Appeal (Pollock M.R., Warrington and Atkin L.JJ.).

May 12, 14. *Edwardes Jones K.C.* and *Hildesley* for the appellants. Because the appellant company is not chargeable to income tax in respect of the profits of its trade by reason of the trade being carried on wholly outside the United Kingdom it is not chargeable to corporation profits tax under ss. 52 and 53 of the Finance Act, 1920. The generality of the words of s. 52 is restricted by the provisions of s. 53, sub-s. 2. That sub-section says that for the purposes of Part V. of the Act, profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Sch. D. But the profits and gains of the trade carried on by the Chilian board of the appellant company determined on the principles on which they would be determined for the purposes of Sch. D are nil, and therefore the profits determined for the purposes of the Finance Act, 1920, are nil. Upon the proper construction of ss. 52 and 53 that Act does not impose corporation profits tax on the profits of a company incorporated in the United Kingdom which carries on no business in the United Kingdom, but operates through a local board abroad, in respect of profits earned abroad and not remitted to the United Kingdom. The principle of *Colquhoun* v. *Brooks* (1) and *Mitchell* v. *Egyptian Hotels* (2) applies to this case. The concluding words of the sub-section do not affect the question. Those words are " whether the

(1) (1889) 14 App. Cas. 493. (2) [1915] A. C. 1022, 1035, 1037, 1039.

profits are assessable to income tax under that schedule or not," and to construe them as meaning "whether the profits are assessable to income tax or not" is to give no effect to the words "under that schedule." The true meaning of the sub-section is that whether the profits are assessable to income tax under Sch. D or not under Sch. D, say, for example, under Sch. A, as in the case of the profits of a canal company, they are to be determined on the principles on which the profits would be determined for the purposes of Sch. D.

Sir Thomas Inskip S.-G. and *R. Hills* for the respondents. It is not now disputed that, apart from sub-s. 2 of s. 53, these profits would be assessable to corporation profits tax. But the provisions of s. 53 relating to the determination of profits do not restrict the definition of profits chargeable to corporation profits tax contained in s. 52, sub-s. 2 (*a*), so as to exclude any of the profits of the appellants' trade. The words in sub-s. 2 of s. 53, "profits and gains of a trade," are limiting words, and show that profits for the purposes of corporation profits tax are to be computed on the principles applicable to the First Case of Sch. D of the Income Tax Act, 1918; and by implication the rules applicable to Case V. are thereby excluded. The fact that for income tax purposes the trade of the appellants is a source of profit coming within the category of possessions out of the United Kingdom is irrelevant to the question whether and to what extent profits arising from that source are chargeable to corporation profits tax. The concluding words of the sub-section also support the contention of the Crown. The Court of Session in Scotland has independently come to the same conclusion as Rowlatt J. upon the construction of these two sections 52 and 53: *Saxone Shoe Company* (*France*), *Ld.* v. *Inland Revenue.* (1)

Edwardes-Jones K.C. replied.

VISCOUNT CAVE L.C. My Lords, the question raised by this appeal is whether the appellant company, the Alianza Company, Ld., is chargeable with corporation profits tax

(1) 1923 S. C. 734.

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under the Finance Act, 1920. The company is registered in England under the Companies Acts and is possessed of a nitrate business in Chile. Some years ago, acting no doubt upon a hint contained in the well-known case of *Mitchell* v. *Egyptian Hotels* (1), the appellants transferred the conduct and management of their Chilian business to a local board in Chile; and it appears to be common ground that by that means the company, upon the principles laid down in *Colquhoun* v. *Brooks* (2) and the *Egyptian Hotels* case, escaped the payment of income tax upon its Chilian business. The question here is whether it is also exempt from the corporation profits tax.

My Lords, the corporation profits tax was imposed by the Finance Act, 1920. Sect. 52, sub-s. 1, of that Act provides: "Subject as provided in this Act, there shall be charged, levied, and paid on all profits being profits to which this Part of this Act applies and which arise in an accounting period ending after the thirty-first day of December nineteen hundred and nineteen, a duty (in this Act referred to as 'corporation profits tax') of an amount equal to five per cent. of those profits." Sub-s. 2 of the same section is in these terms: "The profits to which this Part of this Act applies are, subject as hereinafter provided, the following, that is to say:—(*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments; (*b*) the profits of a foreign company carrying on in the United Kingdom any trade or business, or any undertaking of a similar character, so far as those profits arise in the United Kingdom." Then follow other words, including a definition of a "British company" as meaning "any company incorporated by or under the laws of the United Kingdom." If the Act had stopped there, there would in my opinion be no possible doubt in this case. The appellant company is a British company within the definition contained in the Act, and does carry on a trade or business in the ordinary meaning of the words, and made in the accounting period in question

(1) [1915] A. C. 1022. (2) 14 App. Cas. 493.

profits out of that trade or business; and the contrast of the language used in para. (*a*) of sub-s. 2 of s. 52 with that used in para. (*b*) of the same sub-section would of itself, if the section stood alone, make it clear that a British company must pay tax on the profits of a business carried on outside the United Kingdom.

But I entirely agree that it is not right to construe the section by itself, and that you must take the Act as a whole and see whether light is thrown upon the meaning of one section by any other section of the Act. Going on, then, to s. 53, the second sub-section of that section is in these terms: "Subject to the provisions of this Act, profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Schedule D set out in the First Schedule to the Income Tax Act, 1918, as amended by any subsequent enactment, whether the profits are assessable to income tax under that schedule or not"; and then follows a proviso which I need not read. It is argued on behalf of the appellants that the effect of that sub-section is that, as the appellant company is not subject to income tax in respect of these profits, it escapes payment of corporation profits tax. In fact, to put it shortly, your Lordships are asked to apply to corporation profits tax the decisions as to income tax contained in the well-known case of *Colquhoun* v. *Brooks* (1) and the case of *Mitchell* v. *Egyptian Hotels*. (2)

My Lords, in my opinion those decisions have no application to this statute. To begin with, the reasoning in *Colquhoun* v. *Brooks* (1), upon which the *Egyptian Hotels* case was founded, proceeded largely upon a comparison of the different provisions contained in Sch. D, and particularly upon a collation of the general words contained in the first part of that schedule (now contained in para. 1 (*a*) of the Act of 1918) with the language of Case V.; and the House found it necessary to reconcile those different provisions, and held that the effect was that the trade in that case, being carried on wholly outside the United Kingdom, escaped

(1) 14 App. Cas. 493. (2) [1915] A. C. 1002.

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payment of tax, except so far as profits were remitted to this country. The decision was also founded to a considerable extent on the fact that no proper machinery was provided by the statute for assessing the profits of a foreign trade. Here neither of those considerations applies. There are no words in the Act of 1920 which apply to a British company in respect of corporation profits tax the provisions of Case V. of Sch. D of the Income Tax Act. Nor is there here any difficulty as to the machinery, for adequate machinery is provided by the 55th and other sections of the Act. Therefore, the reasoning of *Colquhoun* v. *Brooks* (1) does not apply to this case.

Secondly, the exact terms of s. 53, sub-s. 2, are material. Under that sub-section the thing to be determined according to the principles of Sch. D is, not the profit taxable, but the profits and gains of a trade; in other words, it is assumed that the profits of a trade are taxable, and you are inquiring how those trade profits are to be calculated or determined. Now, if one looks at Sch. D there referred to, one does find elaborate rules, which may well be called principles, for ascertaining the profits of a trade falling within the tax. Those rules are modified to some extent by the Act of 1920, so far as corporation profits tax is concerned. For instance, by sub-s. 1 of s. 53 the principle of average does not apply to the profits for this purpose; and there are other modifications. But, subject to those modifications, the rules under Sch. D, as well as certain other well-known principles upon which income tax is assessed, appear to be made applicable by the second sub-section of s. 53 to corporation profits tax, and that (I think) is the meaning of that sub-section.

Lastly, the final words of the same sub-section entirely support the view at which, apart from those words, I should have arrived. Those words are "whether the profits are assessable to income tax under that schedule or not." Now I cannot read those words as meaning "whether the profits are assessable to tax under that or any other schedule."

(1) 14 App. Cas. 493.

In substance the schedule under which trade profits are regularly assessed is Sch. D; and I think the addition of the words "whether the profits are assessable to income tax under that schedule or not" makes clear the intention of the statute that a company which, by registering in this Kingdom, obtains the protection of the British law, whether it is or is not chargeable with income tax, shall be chargeable with corporation profits tax upon the profits of its trade.

I agree with the reasoning and conclusion of the Court of Appeal, and I am fortified in this view by the fact that a similar conclusion was reached by the Court of Session in a recent case relating to the same Act.

For these reasons I think that this appeal fails, and I move your Lordships that it be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. There is no question that these profits are, at any rate, prima facie taxable, clearly taxable, under the terms of s. 52, sub-s. 2 (*a*), and I do not repeat what your Lordship has just said about the contrast between that and (*b*).

The argument of the appellants really comes to this, that the effect of s. 53, sub-s. 2, is as if that section had read "but such profits are only to be taxable if you find, applying the rules under Sch. D, they would be taxable for income tax." Again and again their counsel said: "What would an inspector do if he went according to the rules of income tax? He would find there would be no profits." The trouble in that argument is to be found in the concluding words of that sub-section, "whether the profits are assessable to income tax under that schedule or not." I entirely concur with what the noble Lord on the Woolsack has said about that, but I add this: the learned counsel for the appellants said, almost triumphantly, that he had never had an answer to this question: Why, if the construction of those final words is as his Lordship put it, and not as he wished to put it, was there a reference to Sch. D at all? The answer seems to me an extraordinarily easy one. Sch. D gives a whole congeries

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of rules, and those rules are to be used where they are applicable. They are to a certain extent altered for the purposes of this Act; for instance, under s. 53, sub-s. 1, there is an alteration as to not allowing an average of three years but taking one year; and then there are a whole set of other alterations under the provisos. Nevertheless, with those alterations still there remain a great many rules under Sch. D which are to be applied. Therefore I do not think that other argument is of any avail, and I cannot but think that this answer has been made before.

I also would like to say that I entirely concur in, and I would wish to adopt as my own, so far as it goes, the judgment of the learned Lord President of the Court of Session in the case which has been referred to by his Lordship on the Woolsack.

LORD WRENBURY. My Lords, I am of the same opinion. It appears to me that the case is concluded by express and plain language in the statute.

Sect. 52, sub-s. 1, of the Finance Act, 1920, charges "all profits being profits to which this Part of this Act applies" with corporation profits tax. Sect. 52, sub-s. 2, provides that "the profits to which this Part of this Act applies" are, amongst other things, "the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." This company is a British company. It carries on a trade or business. That trade or business need not be in this country to satisfy the statute. It is a British company carrying on a trade, and the words "the profits to which this Part of this Act applies" cover the profits of this company. The corporation profits tax is imposed upon those profits.

Then an argument is raised upon s. 53, sub-s. 2, which, by reference, sends you to Sch. D in the First Schedule to the Income Tax Act of 1918. The relevant words which govern the whole of that sub-section are the concluding words "whether the profits are assessable to income tax under that

schedule or not." If there were under consideration a question of income tax there would arise under circumstances as relevant considerations whether the profits were earned in this Kingdom or whether they were payable to a person resident in this Kingdom. For the purpose of this sub-section I am to dismiss those considerations altogether, I am to be careless whether the profits are assessable to income tax or not. Suppose the sub-section had run: "Subject to the provisions of this Act profits shall be the profits and gains including profits not assessable to income tax determined on the same principles" and so on: there could have been no question about the matter. The section as it stands has (having regard to the final words) exactly the same effect. I am to disregard all those circumstances which, if the case were one of income tax (which it is not), would exclude certain profits, and I am to include all the profits, and then for the purpose of computation I am to proceed by the principles which are directed by Sch. D.

My Lords, I think the case is governed entirely by the plain language of the Act, and that this appeal fails.

LORD PHILLIMORE. My Lords, I agree. The strength of the argument of counsel for the appellants turns on s. 53. The answer, I think, is this: s. 52 imposes a tax on "all profits being profits to which this Part of this Act applies." These are described in a later part of the same section as being (inter alia) "the profits of a British company carrying on any trade." This is a British company carrying on a trade. Then comes the question: What are to be its profits for the purpose of this taxation? And s. 53 answers that question. They are such profits as would be profits if you were investigating the profits of a trade under Case I. of Sch. D, not such as would be profits if the matter came under Case V. or any other case, nor such as would be profits if it was not a trade under Case I. It makes no matter that this particular company does not carry on a trade within the meaning of Case I. The reference to Case I. is only to give a standard, chosen perhaps arbitrarily, for the purpose of

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computing profits. When profits have been ascertained according to this standard they become the profits of this company.

LORD CARSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 14, 1925.

Solicitors for the appellants: *Dale & Co.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 *March* 13.

OWNERS OF STEAMSHIP MATHEOS . APPELLANTS;

AND

LOUIS DREYFUS AND COMPANY . . RESPONDENTS.

Shipping—Charterparty—Demurrage—Exception of Detention by Ice.

A ship was chartered to proceed to a port in the Danube and there load a cargo of wheat. The charterparty allowed seventeen running days (Sundays and recognized holidays excepted) for loading and unloading and ten days on demurrage at 40*l.* a day and, except as therein provided, "detention by frost or ice from Ibrail down to Sulina . . . . shall not count as lay days." There were three customary modes of loading grain at Braila (locally called Ibrail)—(*a*) at the quay from silos in the dock, (*b*) from lighters in midstream, (*c*) from the river bank by the use of gangways and manual labour. The ship arrived at Braila, and on December 10, 1921, the charterers required the ship to enter the dock, the intention being to load a small part of the cargo at the dock and the rest in midriver, the water in the dock being insufficient to load a full cargo. At this time the only available berth was occupied by another vessel, which it was arranged should be moved, and in the meantime the chartered ship anchored outside and alongside this other vessel. Two days later all the vessels in the dock became icebound and remained so for three months. A claim by the owners for demurrage and damages for detention having been referred to arbitration under the charterparty, the

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

umpire found that, though it would have been difficult and expensive to load the ship during the frost in the position in which she then was, it would not have been physically impossible to do so by means of chutes and stages and manual labour:—

Held, (1.) that the exception in the charterparty applied in the event of detention by frost or ice at any place between Ibrail and Sulina, both inclusive; (2.) that as the charterers were entitled to select the dock as the place in which to begin loading the exception attached; (3.) that the finding of the umpire meant that loading by hand during the frost was commercially impossible; and that consequently the charterers were protected by the exception.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J. upon an award of an umpire stated in the form of a special case.

The dispute which was the subject of the arbitration arose out of a claim under a charterparty for demurrage and damages for detention. The charterparty was dated November 28, 1921, and provided that the appellants' steamship *Matheos* should proceed to Sulina, at the mouth of the Danube, and as there ordered by the respondents to one or two safe places on the Danube, and there load a full cargo of wheat.

Clause 7 provided: "Seventeen running days, Sunday, Good Friday, Easter Monday, Whit Monday, and Christmas Day and other recognized holidays excepted, are to be allowed . . . . for loading and unloading and ten days on demurrage over and above the said lay days at 40*l.* per running day or pro rata for part thereof."

Clause 11 provided: "Except as herein provided, detention by frost or ice from Ibrail down to Sulina, also detention by quarantine, shall not count as lay days." The steamer duly arrived at Sulina and was ordered to Braila (locally called Ibrail), which she reached on December 7. The arbitrator found that there were three customary methods of loading grain at Braila: (1.) at the quay from the silos in the dock; (2.) from lighters and floating elevators in midstream at a place called Baths; and (3.) from the shore on the left bank of the river by the use of gangways and manual labour.

No orders to load were given by the respondents until December 10, when they ordered the captain to move the ship into the dock at noon, the intention being to

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load a small portion only of the cargo at the dock. The whole cargo could not be loaded there, because there was no sufficient depth of water. At the time of her entry into the dock the only berth at which she could load was occupied by another ship, the *Valkenburg*. From December 12, 1921, until the morning of March 9, 1922, the dock was frozen over, and neither ship could be moved between these dates. No attempt was made to load the *Matheos* between these dates. The umpire found that it would not have been physically impossible to load the ship while frozen in the dock by means of chutes and stages and manual labour, although it might have been difficult and expensive, and he continued: "One reason admitted (sic) by charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer and no insurers would have accepted the risk of insurance." On March 10 the *Matheos* took the berth which had been vacated by the *Valkenberg* the previous afternoon, but her loading was not begun until March 22, because the Rumanian Government, who supplied the cargo, held it up until they had satisfied themselves that there was a sufficient supply of wheat for home consumption, and the ship did not sail until April 5.

On these facts the umpire found that clause 11 of the charterparty applied only to a ship in transit between the two named ports, and awarded that the respondents were liable to the appellants for ten days' demurrage and 87¾ days' detention at Braila.

Rowlatt J. upheld the award on the ground that, inasmuch as the respondents had only been prevented by ice from loading in one of three customary ways, they were not relieved by the exception. The Court of Appeal (Bankes, Scrutton and Sargant L.JJ.) reversed this decision, and held that the respondents were protected by clause 11 of the charterparty.

1925. Feb. 5. *Raeburn K.C.* and *S. L. Porter* for the appellants. Under this charterparty, there being an absolute obligation to load in a given number of days, the charterers

cannot escape from that obligation unless excused by the express terms of the charterparty. The umpire has not found that the charterers were prevented by ice from loading the vessel in the stipulated time. There were three usual methods of loading at Braila, and the charterers might have selected another method of loading. On the question whether, having regard to the fact that the quay was occupied by the *Valkenburg*, it was commercially possible for the *Matheos* to load in the position in which she was, the umpire does not find the contrary. At the most his finding on this point is ambiguous. The Court of Appeal ought not to have assumed that the umpire as a commercial man intended to find impossibility, but in case of doubt should have remitted the case to him. But commercial impossibility is the basis of their judgment. In the circumstances of this case the charterers took the risk of ordering the ship into the dock. Where an option is expressly given by the charterparty the charterer may select as he pleases, and he is bound by his selection, and the same may be the case where there is no express option. Here there were only two places at Braila where the ship could be fully loaded. She could not be fully loaded in the dock, because there was not enough water and, having regard to that fact, the dock, it is submitted, was not one of the loading places contemplated by the charterparty. The charterers sent the ship to the dock to load a small portion of the cargo for their own convenience. They cannot shift her from one place to another.

[They referred to *Hudson* v. *Ede* (1); *The Felix* (2); *Bulman & Dickson* v. *Fenwick & Co.* (3)]

[Counsel also proposed to contend that the respondents were responsible for the delay caused by the action of the Rumanian Government, but in view of the fact that this point had been abandoned before Rowlatt J., and as a consequence the Court of Appeal refused to entertain it, their Lordships held that the point was not open to the appellants.]

(1) (1867) L. R. 2 Q. B. 566; (1868) L. R. 3 Q. B. 412.
(2) (1868) L. R. 2 A. & E. 273.
(3) [1894] 1 Q. B. 179.

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Jowitt K.C. and *Le Quesne* for the respondents.

The LORD CHANCELLOR intimated that their Lordships would give notice to counsel for the respondents if they desired to hear them.

1925. March 13. VISCOUNT CAVE L.C. My Lords, this Appeal concerns a claim by the owners of the steamship *Matheos* against the charterers of that vessel for demurrage and damages for detention.

Under the charterparty, which was dated November 28, 1921, the vessel was to proceed to a port in the Danube and there load from the factors of the freighters a cargo of wheat, and was to proceed to a port in the United Kingdom or on the Continent. Seventeen running days (Sundays and certain other days excepted) were to be allowed for loading and unloading, and ten days on demurrage at 40*l.* per day. The charterparty contained the following clause: "(11.) Except as herein provided, detention by frost or ice from Ibrail down to Sulina, also detention by quarantine, shall not count as lay days."

The port selected as the loading port was Ibrail, also known as Braila, on the Danube. On December 7, 1921, the vessel arrived there, and notice of readiness to load was given to the charterers' agents. There were three usual and customary methods of loading grain at Braila—namely, (*a*) at the quay from silos in the dock; (*b*) from lighters in midstream at a place called the Baths; and (*c*) from the river bank by the use of gangways and manual labour. The charterers had sufficient cargo in the docks and in lighters to load the *Matheos*, and their intention was to load a small part of the cargo in the dock and the remainder in midriver. It was thought desirable to load first the grain in the dock; and, accordingly, on December 10, the charterers' agents required the vessel to enter the dock and load the grain there. At this time a vessel called the *Valkenburg* was loading at the only available quay, and it was arranged that she should be moved and make way for the *Matheos*, which in the meantime was anchored outside and alongside the *Valkenburg*.

On December 12 a severe frost set in and the dock became completely frozen over; and from that date until the following March 9 the *Matheos* and all other vessels in the dock remained icebound. On March 9, 1922, the dock became clear of ice, and the *Matheos* took her berth alongside the quay; but loading could not immediately begin, as the Rumanian Government was then holding up the shipment of wheat. On March 22, this prohibition being removed, loading began and proceeded rapidly, and the vessel sailed on April 5, 1922.

The time which elapsed from December 7, 1921, when the vessel was ready for loading, until April 5, 1922, when she sailed, exceeded the time allowed for loading by 97¾ days; and accordingly a claim was made for ten days' demurrage and damages for 87¾ days' detention, amounting in all to a sum exceeding 4000*l*. The claim was referred to arbitration, and the arbitrator on July 11, 1923, made his award, allowing the claim and stating a case for the opinion of the Court. Upon the argument of the case Rowlatt J. affirmed the award; but on appeal to the Court of Appeal that Court held that the charterers were protected by clause 11 of the charterparty, and set aside the award. Hence the present appeal.

My Lords, Mr. Raeburn, on behalf of the appellants, raised a number of contentions, some of which were disposed of during the argument, and the only questions to which I feel it necessary to refer are the following:—

First, it was said that, having regard to the words "from Ibrail to Sulina" in clause 11 of the charterparty, that clause was only intended to have effect in the case of detention by frost or ice during the transit between those ports. This contention, though accepted by the arbitrator, was rejected by Rowlatt J. and the Court of Appeal, and appears to be quite untenable. The clause refers to lay days, and there could be no question of lay days during the passage of the vessel down the Danube. The effect of the words is to limit or define the operation of the clause as applied in *Hudson* v. *Ede* (1), so that it should have effect in the event of detention

(1) L. R. 2 Q. B. 566; L. R. 3 Q. B. 412.

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by frost or ice at any place between Ibrail and Sulina both inclusive.

Secondly, it was argued that the loading of the ship was not absolutely prevented by the ice, as the ship could have been loaded in the dock by manual labour either from the quay or from the lighters lying in the dock, and the time afterwards spent in loading could have been saved. To this it was answered by the charterers that it was commercially impossible for this to be done. This was a question of fact for the arbitrator, and paragraph 19 of his award is in the following terms: "No attempt in any way was made to load the *Matheos* at any time between the dates above mentioned, viz., December 12, 1921, and March 9, 1922, and although to do so in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by charterers' witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer and no insurers would have accepted the risk of insurance." This finding is not as clear as it might have been, but it is undesirable after the time which has elapsed since the award to send it back for an amended finding. The paragraph must be construed as it stands; and I agree with the Court of Appeal in construing it as a finding against the commercial possibility of the course suggested. The arbitrator finds that loading by manual labour was physically possible, but difficult and expensive; and he refers, apparently with assent, to an argument showing that loading would have been useless owing to the heating which would have occurred and the consequent impossibility of effecting an insurance. I think he meant that loading by hand during the frost was in the commercial sense impracticable, and certainly there is no finding the other way. This argument therefore fails.

Mr. Raeburn desired to raise an argument as to the effect of the Government prohibition against loading; but it was found that the point had been abandoned in the Court below, and it could not therefore be pursued.

In my opinion this Appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN. My Lords, three questions arise on this appeal, the determination of which will settle whether the judgment complained of is right or should be altered.

The first is whether the words "from Ibrail down to Sulina" make the clause only apply to a transit from the one place to the other, and make the clause inapplicable to what happens at Braila itself. The umpire took this view, but both the learned judge who tried the case and the judges of the Court of Appeal held the opposite. I think they were clearly right. The clause is as to lay days, and lay days have no place in a transit voyage. The reason of the limitation is clear enough. It was to prevent questions as to detention of cargo by ice far up the river. The clause means detention by ice within the limits specified.

The second question, and on this the Court of Appeal has differed from the learned trial judge, is whether the loading in this case was truly prevented by ice so as to cause detention in respect that the landing places in the river and at the bank would have been available had the vessel gone there. I agree with the Court of Appeal. I think the facts decide the matter. Once it is shown, as it was shown, that the charterer was within his rights in ordering the vessel into the docks, and that having got there the vessel could not get out again because of ice, it seems to me the matter is concluded. It is just the same case as the case of a choice of ports of which *Bulman & Dickson* v. *Fenwick & Co.* (1) is an example.

The third question, and it is this alone which has in my view raised any difficulty, is whether nevertheless in the circumstances the charterer might not have effected loading or partial loading lying where the vessel was, and thus at least saved some time of detention.

The difficulty arises from the somewhat ambiguously worded finding of the umpire on the point. He says:

(1) [1894] 1 Q. B. 179.

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"Although to do so (i.e., to load) in the position where she was might have been difficult and expensive, I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by the charterer's witness for not loading the steamer during this period was that the cargo would probably have become heated in the steamer."

Now this finding must be read in the light of the fact that the charterer contended before the umpire, as he himself sets forth, that it was commercially impossible to load the vessel in its position by any way except the usual way by cranes from the berth, and it had been found that she was unable to get to the bank because of ice. I therefore come to two conclusions. First, I agree with the Court of Appeal that in view of the pleading the umpire in putting stress on the word "physically" must be held to have used it as the antithesis to commercially; and commercial possibility not physical possibility is the real question.

But further, I think that once the proper and usual mode of loading was negatived as rendered impossible by ice, it really fell on the owners to get from the umpire a finding of commercial possibility; seeing that that possibility could only rest on a novel and, so far as we can see, hitherto untried method. It is not as if the alternative method to the usual method, which ex hypothesi is found impracticable, was a usual one. Given impossibility by crane, I do not doubt that it would be incumbent on the charterer to prove impossibility by lighter. But this is quite a different thing, unused, untried, and problematical. In such a case it seems to me the onus shifts, and the owners on whom the shifted onus falls have not discharged it.

I agree that the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur in both the judgments that have been delivered by my noble and learned friends.

LORD SUMNER. My Lords, it is found in the case stated and has not been contested that on December 7, 1921, at

noon, the Greek steamer *Matheos* was an arrived ship. She was in her designated port of loading according to the charter; she was in fact ready to load at any accustomed loading place, as ordered by the charterers' agents, and she had given notice that she was so ready. Accordingly the lay days from that time were running against the charterers.

On December 10 orders were given to enter the dock, where grain was stored in silos, and to load there at a quay berth. This is one of three usual and customary ways of loading grain at Braila. The ship entered the dock without demur. For a vessel of her size only one quay berth was suitable from which to load at the silos.

The charter contained no express provision for shifting berths, and it was suggested at your Lordships' Bar that, in the absence of such a provision, the charterers could only require the ship to go to a loading place, at which they could fulfil their entire obligation to load a full and complete cargo. From the findings of fact it appears, incidentally but still sufficiently clearly, that the *Matheos*, if fully laden, could not have got out of the dock for want of water on the dock sill. Beyond observing that the charter authorized the charterers to order the ship to one or two loading places in the Danube, and did not therefore require them to fill the ship at Braila, no opinion need be expressed on this contention, for, on learning that it had not been raised before the umpire, so that there had been no opportunity to give evidence as to such matters as the custom of the port and the power of the captain of a Greek ship to bind his owners by accepting the charterers' orders, Mr. Raeburn very properly gave up the point.

On December 10, another ship, the *Valkenburg*, was already lying at the quay berth in question and loading from the silos, and at that time of year the river might be expected to freeze very shortly. Indeed on that very day the Port authorities gave public notice warning lighters and other craft to seek shelter, and many accordingly entered the dock, even though the still water there would probably freeze earlier than the running water in the river. Neither of these

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circumstances, however, prevented the quay berth in the dock from being a loading place, to which the charterers might lawfully order the *Matheos*. Under the charter the risk of delay in reaching it was on them, unless they were protected by some exception, since the lay days had already begun to run. They took this risk but were under no obligation to select a loading place advantageous to the ship. The result was that the *Matheos* only reached a position parallel with the *Valkenburg* but some yards further out from the quay, and there she remained, when, on December 12, the dock became frozen over. The *Matheos* was frozen in until March 9, 1922. The question is whether she was on demurrage or whether, as against the charterers, her lay days were suspended.

The charterers' case is that clause 11 of the charter applied and protected them, for detention by ice occurred, and such detention is not to count as lay days. It was for them to give evidence of facts, which would bring them within the exception, and it was for the umpire to state his own conclusions of fact on the evidence before him.

Prima facie the charterers' defence was established, for it was plain that the *Valkenburg* was frozen into the berth and that the *Matheos* was frozen out of it, but of course the charterers could not claim that ice had prevented loading, if the loading could and should have proceeded notwithstanding the ice. This, however, does not mean merely that it was physically possible to have put wheat into the ship, but that it was commercially practicable. There has been some dispute as to the meaning of the umpire's finding on this question. He recites the charterers' contention thus: "7. That it was commercially impossible and/or impracticable to load the *Matheos* while she was in the ice in the dock. . . . . Moreover, if it had been possible to load the *Matheos* while so detained in the ice and if she had been so loaded, the wheat would have become or would have been in danger of becoming heated in the hold of the said vessel in the ice and no insurer would have accepted such a risk."

On the other hand the contention of the shipowners is thus

stated: "3 (A) ii. In any case upon the evidence there was no prevention of loading, though there may have been greater difficulty in loading at Braila itself. The ship could have been loaded in the dock itself by hand, or might have been ordered to load in midstream or from the quay on the north bank of the river, both of which are admittedly usual loading places."

The finding is as follows: "19. No attempt in any way was made to load the *Matheos* at any time between December 12, 1921, and March 9, 1922, and although to do so, in the position where she was, might have been difficult and expensive I am of the opinion that it would not have been physically impossible to do so by means of chutes and stages and manual labour; one reason admitted by charterers' witness for not loading the steamer during this period was, that the cargo would probably have become heated in the steamer and no insurer would have accepted the risk of insurance."

Counsel for the shipowners, to whom this point had become far more crucial in the Court of Appeal than it had been at the arbitration, when so many other points were still being put forward, argued, first, that the umpire meant to find that loading was commercially practicable during the period in question, though no doubt expensive; second, that as a matter of law the defence of excepted perils could not succeed, unless the charterers obtained an affirmative finding that such loading was commercially impracticable; and, third, that his finding was at least ambiguous and that the case ought to be remitted to him for a clearer statement.

My Lords, I should be most reluctant to advise your Lordships to remit the case. In the nineteen months that have elapsed since it was stated, and doubtless after hearing many other arbitrations in the meantime, the umpire has probably forgotten all about it and, if so, evidence would have to be gone into about events that happened at Braila over three years ago.

I do not think that in a matter, which was peculiarly one for an expert, and on a point where he has not misdirected himself in point of law, it can be said that the charterers

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must necessarily fail, unless they obtain an express finding that the operation was commercially impracticable. If the evidence as to the ice had stood alone, the umpire could not have been required in law to demand evidence negativing the commercial practicability of alternative modes of loading and to reject the evidence of detention by ice, unless such further evidence was forthcoming. It has been decided that, when a prima facie case of excepted perils is met by an allegation of negligence: *The Glendarroch* (1), or unseaworthiness: *The Northumbria* (2), the burden of proof shifts to the party interested in establishing this allegation affirmatively, and I do not see why the same rule should not apply to an allegation of the existence of a practicable alternative mode of loading. If, in expressing his findings, the umpire negatives the allegation in silence by not giving effect to it (if indeed it was raised by the shipowners at all), I do not think that his award can be said to be defective on its face. It seems to me to be a pure matter of construction, and I am by no means prepared to dissent from the construction adopted by the Court of Appeal. Having gone so far as to say, that the operation would not have been physically impossible, the umpire might well think that, if he went no further, any one would understand (as, personally, I should do) that, as a matter of business, it was out of the question. The concluding words of his finding seem to leave no doubt. Something in the sentence must be misprinted. To substitute "ship's" for "charterers'" would clear this up, but we are assured that no ship's witness made such an admission. Let it be assumed then that "admitted" should be "asserted" or "alleged." Why should the umpire refer to this piece of evidence in his finding at all, if he did not mean that he found it to be both important and true? It cannot be an ironical way of finding, that the charterers failed to resort to a practicable alternative, because they wished to save their pockets. I think it is reasonable to impute to him another meaning, If the wheat heated from a detention of months under hatches, it might not merely be damaged, but might arrive at its

(1) [1894] P. 226. (2) [1906] P. 292.

destination no longer in specie. It is not a practicable thing, in addition to the expense of such a mode of loading, for the charterers to run the risk of losing the wheat uninsured, and for the shipowner to run the risk of losing his freight at the end of the voyage and of being left to claim on his insurance on freight.

The questions on the effect of clause 11 are these: The umpire thought it only applied when the ship was proceeding from Braila down to Sulina. This view was abandoned in the Court of Appeal. As Scrutton L.J. points out: "time used in passing along her voyage is not part of her lay days." At your Lordships' Bar is was suggested, that, just as in marine policies there is a difference between an insurance "at and from" and one "from" only, so here this exception must be deemed not to apply "at" Braila but only, as in *Hudson* v. *Ede* (1), to the lighters bringing intended cargo from Braila down to Sulina, or that, as it was put in other words, it is a transit exception not a stationary exception. If so, of course, the exception is nugatory as regards the ship for the reason given by Scrutton L.J., and the words now added to the clause as it stood in *Hudson* v. *Ede* (1) operate as a limitation on the exception as applicable to lighters. I think the words clearly apply to the detention of the ship at Braila, for they are words indicating the extremities of a section of the river, which is inclusive of the named ports, applying as they do to operations of loading, which are to take place at and in those ports.

Rowlatt J. took a third view—namely, that, as the charterers might have chosen either of two other loading places, in which the exact detention that happened in the dock might not have happened, they had not brought themselves within the exception. "The charterers," he says, "could not invoke that clause, unless the prevention went to all the forms of loading, which were three, which were open to him at his option in Braila." Otherwise, he would really be prevented from loading by his own selection of a loading place. He must take all the risk of the selected

(1) L. R. 2 Q. B. 566; L. R. 3 Q. B. 412.

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loading place proving to be more disadvantageous for loading than the others. This reasoning seems to me to be inconsistent with the fact that the order given was accepted, and that the dock was, when the order was given, a proper loading place. The risks of any change in the circumstances were the subject of provision in the charter itself, and there is nothing to restrict the charterers' choice in the manner suggested. I agree with the view of the Court of Appeal. The *Matheos*, being an arrived ship, was entitled to have a usual loading place intimated to her, but it was for the charterers to select for her, among the usual and proper places, one, which thereon became the place where her loading was to begin, and exceptions excusing delay in this loading attach and have relation to that place and mode of loading.

I have only to add, that I think your Lordships could not but refuse, as was done during the argument, to permit questions to be raised as to the effect of the Rumanian Government's embargo, which had been advisedly disclaimed on the charterers' part before Rowlatt J. No special ground for indulgence was shown, nor can it be said, by way of appeal, that the Court of Appeal was not entitled to hold the charterers to this disclaimer.

My Lords, for these reasons I think that the order of the Court of Appeal was right and should be affirmed. My noble and learned friend, Lord Buckmaster, has asked me to say that he agrees with the opinion I have just delivered.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 13, 1925.

Solicitors for the appellants: *Holman, Fenwick & Willan.*
Solicitors for the respondents: *Richards & Butler.*

[HOUSE OF LORDS.]

HARNETT . . . . . APPELLANT; H. L. (E.)*

AND 1925

BOND AND ANOTHER . . . . . RESPONDENTS. *May* 15.

Lunacy Acts—Reception Order—Probationary Leave of Absence—False Imprisonment—Recapture—Subsequent Detention—Direct Consequence of unlawful Act—New Cause Intervening—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 55, 330.

The plaintiff, having been received into, and detained as a lunatic in, a house licensed for the reception of lunatics under a duly certified reception order, was granted leave of absence on trial, under s. 55, sub-s. 3 (*b*), of the Lunacy Act, 1890, for twenty-eight days. The order granting the leave empowered the manager of the licensed house to take back the plaintiff at any time before the expiration of the said period if his mental condition required it. On the second day of his leave the plaintiff went to the office of the Commissioners in Lunacy and asked to see one of the Commissioners. The Commissioner, after seeing him, telephoned to the manager of the licensed house that the plaintiff was not in a fit state to be at large, and detained the plaintiff for two or three hours while the manager sent a motor with two attendants to take him back to the licensed house. Thereafter the plaintiff was detained in that house and other institutions for lunatics from December 14, 1912, till he escaped on October 15, 1921. He then brought an action against the Commissioner and the manager, charging them jointly and severally with false imprisonment. The case was tried before a judge and jury. The jury found that the plaintiff on the day he was taken back was not of unsound mind or dangerous to himself or others, and was fit to be at large; that the Commissioner alone caused him to be detained until the attendants came, and did so for the purpose of the plaintiff being detained at the licensed house; and that the manager honestly believed that the plaintiff was of unsound mind, and that it was in the plaintiff's interest that he should be taken back to confinement, but that he had not exercised reasonable care. The judge directed the jury that it was open to them, if they thought fit, to treat the subsequent long detention of the plaintiff as a direct consequence of the defendants' acts and, as the result of the findings of the jury, gave judgment against the Commissioner for 5000*l.* and against both defendants for 20,000*l.*

The Court of Appeal having ordered a new trial in the case of the Commissioner and directed judgment to be entered in favour of the manager, the plaintiff appealed:—

Held (1.) that, although on the findings of the jury as to the plaintiff's mental condition, the Commissioner was liable in damages for wrongful

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

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detention, the subsequent detention of the plaintiff at the various institutions for lunatics was not the direct consequence of the Commissioner's wrongful act; that the reassumption of the control of the plaintiff by the manager was a novus actus interveniens, and consequently the liability of the Commissioner did not extend beyond that period.

(2.) That there was no foundation for the charge against the manager of detaining the plaintiff without lawful authority. The manager was the judge of the question whether the patient's mental condition required that he should be taken back before the expiration of his leave of absence; the power reserved by the leave of absence order to retake the patient was capable of being exercised outside the licensed house wherever the patient could be found, and thereafter the patient could be detained under the existing reception order.

(3.) That there was no evidence to support the finding of the jury that the manager had failed to exercise reasonable care.

Decision of the Court of Appeal [1924] 2 K. B. 517 affirmed.

APPEAL from an order of the Court of Appeal (1) setting aside a verdict and judgment in favour of the appellant, the plaintiff in an action for false imprisonment tried before Lush J. and a special jury.

The appellant was a farmer of Newington, near Sittingbourne in Kent. The respondent, Dr. Charles Hubert Bond, was formerly a Commissioner in Lunacy and was now a member of the Board of Control, the successors of the Commissioners.

The respondent, Dr. George Henry Adam, was the owner and manager of a house licensed for the reception of lunatics known as Malling Place, West Malling, in Kent.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of the Lord Chancellor.

The appellant claimed damages against both the respondents jointly for wrongfully conspiring to cause the appellant to be detained at the offices of the Commissioners in Lunacy at 66 Victoria Street, London, and thereafter at the respondent Adam's licensed house. He also claimed against both the respondents in respect of the said alleged acts as several torts.

Lush J. put a series of questions to the jury which, with their answers, are set out in the opinion of the Lord Chancellor, and as the result of their findings he entered judgment against

(1) [1924] 2 K. B. 517.

the respondent Bond for 5000*l.* and against both the respondents for 20,000*l.*

The Court of Appeal ordered a new trial in the case of the respondent Bond on the ground of misdirection, and ordered judgment to be entered for the respondent Adam on the ground that there was no evidence to support the charge against him.

1925. Mar. 9, 10, 12, 13. *S. Cope Morgan* and *J. W. Morris* for the appellant. It must be conceded that on November 10, 1912, the appellant was properly certified and detained by Dr. Adam at Malling Place. But his insanity was the result of a toxin given him by a quack, and the doctors are agreed that insanity so produced is transient. On December 4 the appellant made an escape to see his solicitor and he returned the same day. On December 10 Dr. Adam had made up his mind that the appellant was sufficiently recovered to be let out, and on December 12 he was let out. Dr. Adam's case is that the appellant was let out on probation under the Lunacy Act, with a power to take him back if his condition required that course, but the appellant thought that he was to be allowed to go free. On December 14, 1912, the appellant went of his own motion to the offices of the Commissioners of Lunacy, and was there forcibly detained by Dr. Bond, who was the Commissioner in charge of the office on that day. Before Dr. Bond had seen the appellant he telephoned to Dr. Adam on receiving the appellant's card to bring a car to take him back to the asylum. Dr. Bond had the file relating to the appellant, he had the certificate, and the record of the appellant's escape on December 4, but it did not appear that he knew that the appellant had been allowed out of the asylum. The latter was forcibly detained pending the arrival of the motor car sent by Dr. Adam. Dr. Bond then sent him back to the asylum in the charge of Dr. Adam's keepers. There and elsewhere the appellant was detained for nearly nine years. He then made his escape, and, after the expiration of the fourteen days, during which he might

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be retaken, he at once went to two eminent doctors, Dr. Risien Russell and Dr. Hyslop, both of whom found him to be sane. The crucial question at the trial was whether the appellant was sane on the day when he visited the Commissioner. The jury found that he was then sane. Therefore a sane man was detained for nine years. For that detention the jury awarded 25,000*l*. The action was for false imprisonment. To that action Dr. Bond had admittedly no defence. So far as Dr. Bond was concerned the question was what damages could be obtained for the admitted wrong. Lush J. told the jury that it was for them to consider whether the continued detention flowed from the original wrong, and this was a proper direction. The Court of Appeal have treated the act of Dr. Adam as a novus actus interveniens, but that is directly opposed to the opinion of Lord Finlay in *Everett* v. *Griffiths*. (1) Here the Court of Appeal have found that Dr. Adam was an independent person as from the night on which the appellant was detained. They then said what was more reasonable than that Dr. Adam should be influenced by the authority of Dr. Bond. But if it was reasonable for Dr. Adam to detain on Dr. Bond's authorization then Dr. Adam could not be a novus actor relieving Dr. Bond from liability. The law is laid down by Lord Dunedin and Lord Sumner in *Weld-Blundell* v. *Stephens*. (2) The appellant has to maintain that Dr. Bond's action was the direct cause of the appellant's detention at Malling Palce on December 14. It was Dr. Bond's action in keeping the man waiting for two or three hours in the office and in telephoning to Dr. Adam to send a car to take him back to the asylum, coupled with the drive back in the car in the charge of two attendants, which produced the excitement which Dr. Adam noticed in the appellant's demeanour on his return and was the direct cause of his renewed detention in the asylum. In the circumstances it cannot be said that the judgment which Dr. Adam formed on seeing the appellant on his return was a novus actus interveniens, so as to break the chain of causation. Bond created

(1) [1921] 1 A. C. 631, 667. (2) [1920] A. C. 956.

the symptoms upon which Adam acted. In no true sense can Dr. Adam's opinion be said to be an independent opinion. It is said that because Dr. Adam was bound to form an opinion as to the appellant's state of mind the detention at Malling Place was not the direct consequence of the detention in London, in spite of the fact that Dr. Adam's wrong opinion was influenced by Dr. Bond's wrongful act. Supposing the appellant's state of mind was such that Dr. Adam's opinion was right, could it be said that the intervention of Dr. Adam's opinion broke the chain of causation if the appellant's renewed insanity had been brought about by Dr. Bond's act? Then can it make any difference that Dr. Adam's opinion was erroneous? The mere fact that Dr. Adam was under a duty to form an opinion, and did form an opinion, was not in itself a novus actus interveniens. There was the detention by Dr. Bond, which was the first link in the chain, and there was the detention at Malling Place, which was another link. Those two detentions were linked together by the opinion of Dr. Adam formed under the influence of Dr. Bond's authority. The continuance of the detention was the direct consequence of the unlawful detention by Dr. Bond. In *Weld-Blundell* v. *Stephens* (1) the real injury to the plaintiff was caused by the action of an independent mischief maker, over whom the defendant had no control. Here Dr. Bond put the appellant under the shadow of insanity, and he remained under that shadow. The jury have found in terms that the appellant was detained for the purpose of being sent back to the asylum. Bond having directed the detention is responsible for it and cannot demand of Adam perfect presence of mind and accurate judgment: *The Bywell Castle.* (2) It is notable how far removed are the consequences held not to be remote: *Engelhart* v. *Farrant & Co.* (3); *Scott's Trustees* v. *Moss* (4); *Rex* v. *Moore.* (5) The closest analogy is slander: *Lynch* v.

(1) [1920] A. C. 956.
(2) (1879) 4 P. D. 219.
(3) [1897] 1 Q. B. 240.
(4) (1889) 17 R. 32.
(5) (1832) 3 B. & Ad. 184.

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Knight (1); *Knight* v. *Gibbs* (2); *Ward* v. *Weeks*. (3) Bond intended the detention, and "intention negatives all excuses and disposes of any question of remoteness of damages": *Quinn* v. *Leathem*. (4) The unexpected result is no answer: *In re Polemis and Furness, Withy & Co.* (5)

As to Dr. Adam, the case against him was also false imprisonment, commencing with the motor journey and continuing until February 22, 1913, when the appellant was transferred elsewhere. It was alleged by Dr. Adam that he released the appellant under a leave of absence order, which reserved to him power to take the appellant back if his mental condition required it. Here the jury have found that the appellant's mental condition did not require it. But even if it is conceded that Dr. Adam had power to take the appellant in again if, in his opinion, the appellant's mental condition required it, Dr. Adam had no power to scour the country and recapture him. Under the Lunacy Act, 1890, the only authority of the manager of a licensed house is to receive and detain. That authority is wholly intramural, and the only extramural authority conferred by the Act is in the case of the patient's escape. That is an exceptional remedy, and its limits are carefully defined by the Act. Assuming that Dr. Adam had power under the Act to arrest the appellant and take him back during the period of his leave of absence, he should first with reasonable care have satisfied himself as to the appellant's mental condition, and the allegation against Dr. Adam is that he took no steps to satisfy himself as to that fact before taking him back. There is ample evidence to justify the finding of the jury. The first point on the evidence is that Dr. Adam ought to have gone himself; but in any event Dr. Adam was negligent on the telephone. Not only did he not acquaint Dr. Bond with the facts, but he took no steps to inform himself as to the appellant's condition at the time. Dr. Bond proceeded on the view that the appellant was an escaped lunatic, and Dr. Adam was negligent

(1) (1861) 9 H. L. C. 577.
(2) (1834) 1 Ad. & E. 43,
(3) (1830) 7 Bing. 211.
(4) [1901] A. C. 495, 537.
(5) [1921] 3 K. B. 560.

in allowing Dr. Bond to remain under that impression. Dr. Adam should have put certain questions to Dr. Bond on the telephone, and it was his omission to do that which led to the whole disaster. As to the question of reasonable care, in *Everett* v. *Griffiths* (1) the House drew a clear distinction between honesty and reasonable care. In the present case, assuming that the doctor had power to recapture the patient if his mental condition required it, that did not mean if the doctor believed honestly, but without taking reasonable care, that his mental condition required it. Having regard to the evidence of Dr. Risien Russell that the shock of the motor car journey in the charge of a couple of keepers from a lunatic asylum must have had a most detrimental effect on the appellant's mind, it is impossible to say that the finding of the jury that Dr. Adam did not take reasonable care in acting as he did cannot be supported. Dr. Adam himself admitted that the shock was likely to upset him. That was a relevant piece of evidence. The effect on the man's mind of this act of recapture was something which the jury were entitled to consider upon the question whether Dr. Adam acted with reasonable care. What Dr. Adam did without reasonable care was that he caused the appellant to be brought back to the asylum before forming his opinion instead of forming his opinion before bringing him back.

Sir Douglas Hogg A.-G., *Harold Morris K.C.*, *Bowstead* and *Harold Murphy* for the respondent Bond.

Alexander Neilson K.C. and *Carthew* for the respondent Adam.

W. E. Hempson held a watching brief on behalf of the British Medical Association.

VISCOUNT CAVE L.C. at the conclusion of the arguments in support of the appeal said that their Lordships were unanimously of opinion that the appeal should be dismissed, but they would require time to put their reasons for that opinion in writing.

1925. May 15. VISCOUNT CAVE L.C. My Lords, this is an appeal by the plaintiff in the action against orders of

(1) [1921] 1 A. C. 631.

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the Court of Appeal in England reversing a judgment of Lush J. in his favour for 5000*l.* against the defendant Bond, and for 20,000*l.* against the defendants Bond and Adam jointly, and ordering a new trial of the action as against the defendant Bond and judgment to be entered in favour of the defendant Adam.

The appellant, Mr. William Smart Harnett, was, on November 10, 1912, received by the defendant, Dr. George Henry Adam, as a private patient in a house licensed for the reception of lunatics, and known as Malling Place, West Malling, in the county of Kent. The reception order was made on the petition of the appellant's brother, and it was not disputed on this appeal that at the date when the reception order was made the appellant was of unsound mind. After the reception of the appellant at Malling Place his mental health improved, and on December 12, 1912, Dr. Adam thought it safe to permit him to be absent upon trial for a period under s. 55, sub-s. 3, of the Lunacy Act, 1890. The consent required by the section was signed by two of the visiting justices for Kent, and was in the following form, which is said to have been approved by the law officers of the Crown :—

"We, the undersigned, being two of the Visiting Justices of Private Asylums for Kent, hereby sanction leave of absence from Malling Place of Wm. Smart Harnett on probation for the period of 28 days, but this sanction is revocable by us at any time during that period; Provided that the Medical Officer shall at any time before the expiration of the said period, have power to take back the said patient into the Licensed House, if his mental condition requires it."

The appellant accordingly left Malling Place on December 12 with his brother, who had been asked by Dr. Adam to take care of him, but shortly afterwards separated from his brother and went to his own home at Sittingbourne. On December 13 he was seen by several persons, who formed varying opinions as to his sanity, and on that afternoon he went up to London and stayed at an hotel near Moorgate Street. On the morning of December 14 he called at the

offices of the Commissioners in Lunacy in Victoria Street, taking with him 30*l.* in a bag, and asked to see a Commissioner. The purpose of the appellant in making this call is not very clear; but it would appear from his evidence, and from a letter which he had written to the Commissioners on the preceding day, that he wished the Commissioners to hand him over to the care of the police and took with him the 30*l.* as payment or security for that purpose. The appellant had interviews with Mr. Dickinson, Secretary of the Board of Control, and with the respondent, Dr. Bond, who was the Commissioner in attendance at the offices on that day; and they both formed an unfavourable opinion as to his mental state and, after consulting the file relating to his case, communicated with Dr. Adam on the telephone. Whether this telephone message was actually given by Dr. Bond or by Mr. Dickinson at his request, and what were the precise terms of the message, is left in some doubt; and this is by no means surprising, as the evidence relating to this conversation was given more than eleven years after it took place. But it appears clearly from the evidence given by Dr. Bond and Mr. Dickinson, as well as from that of Dr. Adam, that Dr. Adam was informed that the appellant was at the office of the Commissioners, and was in a very excited state and unfit to be about by himself, and that Dr. Adam replied that he would send a car and two attendants for him. It was suggested on behalf of the appellant that the message was sent before Dr. Bond had personally interviewed the appellant, but I do not think that this was established; and in any case it is proved that Dr. Bond had a long conversation with the appellant before the car arrived and formed a clear opinion that he was unfit to be at large. Pending the arrival of the car, Dr. Bond caused the appellant to be detained (without the use of any violence) in a room at the offices; and on the arrival of the car the two attendants were taken to the room where the appellant was and took him back with them to Malling Place, where he arrived at about 5 o'clock in the afternoon. On the same evening at about 7 o'clock he was seen by Dr. Adam, who formed the

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opinion that he was much worse mentally than when he had been released on trial, and accordingly detained him under the reception order of November.

The appellant was confined at Malling Place until February 22, 1913, when he was removed to the Croydon Mental Hospital; and on February 25, 1913, he was examined by the medical superintendent of that asylum and certified to be suffering from mania. Similar examinations and reports were made by the medical superintendent on March 25, 1913, October 12, 1913, and subsequent dates. On August 24, 1917, the appellant was removed to the Holloway Sanatorium at Virginia Water, and he was again removed on April 30, 1918, to St. Ann's, Canford Cliffs, and on April 29, 1920, to Aylsham as a single patient; and at each of these places the reports and certificates required by statute for his continued detention were duly made and given. He was also, as the Act required, frequently seen by the Commissioners and the visiting justices, as well as by a Chancery visitor; and to all these persons he appeared to be still of unsound mind, and a proper person to be detained under care and treatment. On October 15, 1921, the appellant escaped from the house at Aylsham; and, having remained at large for upwards of fourteen days, he could not be retaken under s. 85 of the Act and remained at liberty. Shortly afterwards he was examined by two eminent medical practitioners having experience in mental cases, and they declared him to be of sound mind.

On May 31, 1922, the appellant commenced these proceedings against Dr. Bond and Dr. Adam, and by his statement of claim charged them with conspiring together to cause him to be detained at the Commissioners' offices on December 14, 1912, and afterwards at Malling Place, and also with assault and false imprisonment, and claimed damages against both and each of them. No charge of negligence on the part of Dr. Adam was made in the statement of claim; but Dr. Adam in his defence pleaded that he had acted in good faith and with reasonable care, and relied on s. 330 of the Lunacy Act.

The action was heard by Lush J. and a special jury; and after a long hearing the learned judge summed up the case and put to the jury seventeen questions, which were answered as follows :—

1. Did Dr. Bond cause the plaintiff to be detained at the office until the attendants came for him ?—Answer : Yes.

2. Did he cause him to be sent back for the purpose only of his being examined by Dr. Adam or for the purpose of his being detained at Malling Place ?—Answer : Being detained at Malling Place.

3. Did Dr. Bond cause the plaintiff to be taken back ?—Answer : Yes.

4. Was the plaintiff of unsound mind on December 14, 1912 ?—Answer : No.

5. Was he fit to be at large ?—Answer : Yes.

6. Was he dangerous to himself or others ?—Answer : No.

7. Did Dr. Bond honestly believe that the plaintiff was of unsound mind ?—Answer : No.

8. Or that he was not fit to be at large ?—Answer : No.

9. Or that he was dangerous to himself or others ?—Answer : No.

10. Did he believe that the plaintiff had escaped from his brother's charge ? If so, was that his reason for having him sent back ?—Answer : Yes.

11. Did he take reasonable care to ascertain the true facts ?—Answer : No.

12. Did he honestly believe that Dr. Adam had retained a power of taking the plaintiff back during the 28 days in the Leave of Absence Order ?—Answer : Yes.

13. Did Dr. Adam when he received the telephone message and sent the car, honestly believe that the plaintiff on December 14 was of unsound mind and unfit to be at large ? —Answer : Yes.

14. That it was in his interest that he should be taken back to Malling Place ?—Answer : Yes.

15. Did he take reasonable care in acting as he did ?—Answer : No.

16. Did he make it known to the plaintiff that he was

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liable to be retaken if his mental condition required it ?—Answer : No.

17. Was the detention of the plaintiff at the Commissioners' offices the act of Dr. Bond alone or was it really the act of both the defendants ?—Answer : Dr. Bond.

It is common ground that the answer to question 10 was explanatory of the answers to questions 7, 8 and 9, the effect of the four answers being that Dr. Bond acted for the reason given in question 10 and not because of any belief, honest or otherwise, concerning the appellant's state of mind. These answers having been given, the learned judge proceeded to address the jury upon the question of damages, and directed them that they could, if they thought fit, assess damages upon the footing that the confinement of the appellant during the whole period from his return to Malling Place until his escape from Aylsham, was a direct consequence of the acts done by the defendants on December 14, 1912; but being apparently uncertain on this point, and as to the joint liability of the defendants, he requested the jury to make alternative assessments in manner appearing in the following further questions and answers :—

18. Damages against the defendants ?—Answer : 25,000*l.*

(*a*). Apportion the sum of 25,000*l.*—Answer : Bond 17,500*l.* —Adam 7500*l.*

(*b*). Assess the damages on the footing that the defendants are only responsible for the detention up to the 22nd February, 1913, and apportion it, the special damage being 82*l.*—Answer : On this footing the total sum is 10,000*l.* : Bond 7500*l.*—Adam 2500*l.*

(*c*). Assess damages against Dr. Bond merely for detention at the offices, taking into consideration the whole purpose for which he was so detained ?—Answer : 5000*l.*

(*d*). Assess damages against Dr. Bond and Dr. Adam jointly on the footing that they knew the plaintiff would be deprived of the remainder of his 28 days' liberty and apportion that.—Answer : Total sum 9800*l.* Bond 7400*l.*—Adam 2400*l.*

Upon these complicated findings the learned judge was

called upon to pronounce judgment; and after hearing further arguments he held that the chain of causation set up by the detention of the appellant at the Commissioners' offices on December 14, 1912, was not broken, either when Dr. Adam on examining the patient after his return to Malling Place formed the opinion that he was then of unsound mind and detained him, or when the appellant was removed to Croydon in 1913, or in November, 1913, when there was a recertification, or at any subsequent removal or certificate, and that it was quite open to the jury to treat the long detention as the direct consequence of the wrongful acts of the defendants, and on that footing he gave judgment against Dr. Bond for 5000*l.* and against both defendants for 20,000*l.* with costs.

The defendants having applied to the Court of Appeal for a new trial or judgment, that Court (consisting of Bankes, Warrington and Scrutton L.JJ.) unanimously set aside the judgment of Lush J. and ordered a new trial as against Dr. Bond and that judgment should be entered for Dr. Adam. As to Dr. Bond, the learned Lords Justices held that the chain of causation had been broken, not only when Dr. Adam decided to retain the appellant after his return to Malling Place, but at "innumerable points" after that date, and that it was plainly not permissible for the jury in assessing damages to treat the whole period of the appellant's captivity as directly caused by the events of December 14, 1912. As to Dr. Adam, they held that under the terms of the leave of absence order he was entitled to retake the appellant at any time before the end of the twenty-eight days, if in his opinion, honestly formed, it became necessary to do so, and that there was no evidence upon which the jury could find want of reasonable care on his part. From this decision the plaintiff has appealed to this House.

My Lords, as regards Dr. Bond, I feel no doubt whatever that the Court of Appeal was right in ordering a new trial. It is not disputed that, on the assumption that the findings of the jury as to the appellant's mental condition on December 14, 1912, were correct, Dr. Bond had no right to

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cause the appellant to be detained at the office pending the arrival of Dr. Adam's car, and is liable for damages for that illegal detention. But those damages must, on the authorities, be confined to such as were the direct consequence of the wrong committed; and to hold that the detention of the appellant at the offices for a few hours was the direct cause, not only of his being retaken and conveyed to Malling Place, but also of his being confined in that and other houses until October, 1921, appears to me to be impossible. Dr. Bond could not and did not direct or authorize Dr. Adam to retake the appellant or to confine him at Malling Place; the retaking and confinement were the independent acts of Dr. Adam, and each of them was a novus actus interveniens sufficient to break the chain of causation. Further, the confinement of the appellant could not have continued during nine years without repeated examination and recertification by the proper authorities; and for the consequences of those events Dr. Bond cannot on any intelligible principle be held to be responsible. Whether the direct consequences of Dr. Bond's action in detaining the appellant at the office ceased when the appellant was handed over to the two attendants and entered the car, or on his arrival at Malling Place, or later on his being examined by Dr. Adam, it is not necessary now to say. That may be a question to be determined at the new trial. But in any case it appears to me that those consequences cannot on any just view of the matter be deemed to have extended beyond 7 o'clock on the evening of December 14, 1912. It was argued that even on this view of the matter the appellant was entitled to judgment against Dr. Bond for 5000*l.* as the damages assessed by the jury for detention at the offices; but this finding was obviously coloured by the directions given by the learned trial judge on the question of damages, and by the addition to the question of the words "taking into consideration the whole purpose for which he was so detained," and it appears to me that the whole matter ought to receive fresh consideration at the hands of a jury.

With regard to Dr. Adam, it is remarkable that, whereas he

was charged in the pleadings with conspiracy and false imprisonment, no direct question was put to the jury as to either of those charges. The charge of conspiracy was apparently abandoned during the trial, and in any case it was plainly negatived by the findings of the jury in answer to the 13th and 14th questions. The charge of complicity in the false imprisonment at the Commissioners' offices was negatived by the answer to the 17th question, and there was no finding of false imprisonment by Dr. Adam at Malling Place. Why, then, was Dr. Adam held liable in damages at all? It must have been on the ground of the answer of the jury to the 15th question—namely, that Dr. Adam in acting as he did—that is to say, in sending a car and taking the appellant back to Malling Place—did not take reasonable care; and yet want of reasonable care was not charged against Dr. Adam in the pleadings, and the issue only arose on his defensive plea founded on s. 330 of the Act. It appears to me that on this ground alone—namely, the total failure of the plaintiff to establish either of the charges made by him against Dr. Adam—the latter would be entitled to judgment. But in a case of this kind it is undesirable to base a decision on any narrow ground; and I propose to consider shortly whether, either on the findings of the jury or on the evidence, there is any ground for the judgment entered against Dr. Adam.

First, then, was there any ground for charging Dr. Adam with conspiring with Dr. Bond to cause the plaintiff to be detained and removed to Malling Place? Plainly not. There was no evidence to support such a charge, and it is negatived by the findings of the jury. I therefore dismiss this charge as wholly untenable.

Secondly, was there ground for charging Dr. Adam with false imprisonment—that is to say, with retaking or detaining the plaintiff without lawful authority? As to this it was argued that under the terms of the leave of absence order set out above, Dr. Adam could only take back the appellant if the mental condition of the latter required it, and that, as the jury have found the appellant to have been sane on

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December 14, 1912, this condition was not fulfilled. In my opinion there is no foundation for this argument. The provision in the leave of absence order empowering the medical officer to take back the patient "if his mental condition requires it," cannot mean that the medical officer is to take back the patient (if at all) at the risk of having it found by a jury many years afterwards that the patient's mental condition was consistent with his remaining at large. Some person must be the judge of the patient's mental condition at the time when the question arises, and this person can only be the medical officer in whom the power to retake him is vested. Nor is there any substance in the suggestion made by counsel for the appellant that the power to retake the patient reserved by the order could not be exercised by retaking him outside the licensed house: I think it clear that it was capable of being exercised wherever the patient might be found. When once the patient is retaken the leave of absence order comes to an end, and he can be detained under the existing reception order.

But thirdly, stress was laid on the finding of the jury as to want of reasonable care, and it was said that a medical officer could not retake a patient out on trial unless he acted with reasonable care in so doing, that the onus was on him to prove reasonable care, and that if he failed to do so the retaking was void. This argument appears to me to be fallacious. The leave of absence order authorizes the medical officer to retake the patient if the patient's mental condition requires it. If this power is exercised negligently, it may be that there is a remedy; but the negligence does not make the retaking unlawful, and the remedy (if any) is by action for negligence and not by action for false imprisonment. But apart from this observation, I agree with the Court of Appeal in holding that in the present case there was no evidence on which the jury could properly find Dr. Adam to have failed to exercise reasonable care. It is suggested that he should have gone up to London himself or should have sent his assistant. But it was proved that the assistant was entitled to be absent from Malling Place on that afternoon, and that

Dr. Adam could not leave the house without a medical officer; and in these circumstances he was entitled to rely on the information given him by Dr. Bond on the telephone, coupled with his own previous knowledge of the case, as sufficient ground for bringing the patient back, subject of course to the duty (which he performed) of personally examining him on his return. I agree that there was no evidence of negligence and that Dr. Adam is entitled to judgment.

My Lords, I desire to make one further observation. The fact that the appellant, whom the jury found to be sane in December, 1912, and whom they doubtless considered to be quite sane at the time when the action was heard, had been confined as a lunatic during the greater part of the interval between those dates, has naturally given rise to anxiety. It was not proved at the trial or found by the jury that during that interval the appellant was of sound mind; but it is not impossible that the jury took that view and desired to compensate the appellant for his long detention by giving a verdict for heavy damages against the two defendants. If the defendants had been really responsible for an unjustifiable detention of the appellant during all those years, the sum awarded might not have been excessive; but the full investigation of the case both by the Court of Appeal and by this House has led to the conclusion that no such responsibility can be justly laid on Dr. Bond or on Dr. Adam. The Lunacy Acts provide for the protection of the public against the risk of unjustified detention by forbidding the detention of any person as insane except on a proper certificate and in a place duly certified for that purpose, and by requiring that every patient so confined shall be personally seen and examined at regular intervals, both by the Commissioners in Lunacy and by the visiting justices, and shall be free to make complaint (in letters which must be forwarded unopened) to the Lord Chancellor or the Judge in Lunacy, to the Secretary of State or to the Commissioners, or to the persons (generally his relations) on whose petition he has been confined. It may be—I do not say that it is—the fact that all these precautions are insufficient, and that the lunacy laws require to be further

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strengthened in the interests of the persons whom they may affect. But even if that be so, that is no reason for visiting with vindictive penalties persons who have acted in good faith, and who are not responsible for any defect in the law.

In my opinion the Court of Appeal came to the right decision, and I move your Lordships that this appeal be dismissed with costs.

LORD DUNEDIN. My Lords, I have never had a shadow of hesitation in thinking that the judgment of the Court of Appeal was right. Mr. Harnett was detained in a private asylum under a reception order against which nothing has been said. He was then liberated for a period of twenty-eight days on trial under a leave of absence order signed by two visiting justices, but with a proviso authorizing the medical officer at any time during the twenty-eight days to take back the patient if his mental condition required it. Being out of the asylum in virtue of the leave of absence order he of his own accord presented himself at the office of Dr. Bond. He saw Dr. Bond who, having identified his case on the file, knew that he had come from Malling Place. He considered him to be in a very excited state, and thought it would be well that Dr. Adam should see him. He telephoned to that effect, and a motor car with two attendants was sent to take him to Malling Place. Pending the arrival of the car Harnett was forcibly detained. For that detention it is admitted Bond had no legal justification.

But what was the direct result of it? Only that Harnett was examined by Adam. It is true that a question was put to the jury: Did Dr. Bond cause Harnett to be sent back for the purpose only of his being examined by Dr. Adam or for the purpose of his being detained at Malling Place? To which they answered: Being detained at Malling Place. But the question, in my opinion, was illegitimate and misleading. Bond had no power to say that Harnett should be detained at Malling Place, and nothing that Bond thought or intended could make any difference as to Dr. Adam's power to put an end to his liberty on probation or his

responsibility for taking that step. To ask the jury whether Bond's purpose in sending him to Adam was that he should be detained at Malling Place was, if they were to answer as they did, simply to ask them to affirm a non sequitur. Conceivably, though I doubt it, such a question might have been founded on averments as to a malicious motive on Bond's part with an intent to injure, but there was nothing of that in the case. Following on their answer to this question the jury were instructed that they could give damages for the whole period of Harnett's detention, though that detention began, as already stated, by Adam's determination to end the period of probation, and was continued through all the years Harnett was in different places of confinement under renewed orders of different medical men. Such a suggestion has only, in my judgment, to be stated to be rejected. I look on it as preposterous.

As to Dr. Adam, I think he is clearly, under the circumstances, protected by s. 330 of the Lunacy Act.

I feel bound to add that the question of whether a person so admitted can under existing safeguards be kept for an unduly long period in a lunatic asylum is not the question in this case. Indeed, the learned judge expressly told the jury they would not be called on to say what was the plaintiff's mental condition during the nine years of detention. The course of inquiry permitted in the case clashed strongly, in my judgment, with that pronouncement.

I concur.

LORD SUMNER. My Lords, for the reasons just given I concur in the motion proposed by the Lord Chancellor.

LORD BUCKMASTER. My Lords, according to the verdict of the jury in this case, the plaintiff while a sane man has been imprisoned in a private lunatic asylum, and it follows that he has suffered a grievous wrong, for which no money payment can provide an adequate compensation. The jury have obviously been impressed with the gravity of the position and have given a verdict in favour of the plaintiff, which has

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resulted in a judgment for the sum of 5000*l.* as damages against Dr. Bond and 20,000*l.* against Dr. Adam and Dr. Bond jointly, who were in their several degrees held responsible for the injuries that he sustained. The only question is whether Dr. Bond and Dr. Adam together or separately are legally liable for these sums. Dr. Bond is one of the Commissioners in Lunacy whose offices are in 66 Victoria Street. Dr. Adam is the licensed proprietor of a home for the reception of persons of unsound mind at West Malling, in the county of Kent. On November 10, 1912, Dr. Adam received the plaintiff in this establishment under a reception order, which has not been challenged in these proceedings. On December 12, thinking the plaintiff sufficiently restored to justify his release upon a probation order, the plaintiff was permitted to leave the establishment in company with his brother. The brother, however, was not responsible for his safe keeping, nor was the plaintiff placed under his control. On the morning of December 14, at about 10.15, the plaintiff appeared at the offices of the Commissioners in Lunacy with 30*l.* in a handbag and asked to see the Commissioner. He said that he desired that the money should be deposited with the Commissioners to pay for a man to be sent to his house to prevent his being returned to the asylum. The statement as to what actually occurred and the true sequence of events is far from plain. The plaintiff's own account is not consistent, nor does Dr. Bond's memory agree exactly with the memorandum taken at the time. Dr. Bond appears to have thought that the plaintiff had eluded his brother's custody, and this may be explained by one of the plaintiff's statements in evidence where he said he told Dr. Bond, "I am to be under my brother for twenty-eight days." Influenced, it may be, by this, Dr. Bond communicated with Dr. Adam on the telephone, informing him that the plaintiff was there and stating that he did not think he ought to be at large. The plaintiff stayed at the offices from 10.15 to 1.30; at 1.30, when he proposed to go for lunch, he was informed that he was not at liberty to go, and two efforts that he made to leave were prevented, but it is not

suggested that any personal force or violence was exercised. He was, however, detained until about 2.30, when two attendants sent by Dr. Adam from West Malling arrived in a motor car, he was then given into their custody and by them taken back to Dr. Adam, and remained under restraint at one institution or another from that time until his escape in 1923.

The detention by Dr. Bond was an unlawful act, for which he is responsible in damages, and it was decided by the learned judge that the measure of these damages might be taken in terms of the whole period of the plaintiff's confinement. I am unable to see how this can be supported. Dr. Bond had no power and no authority over Dr. Adam, and when once the plaintiff was returned to West Malling the duties with regard to his custody devolved upon and were discharged by Dr. Adam alone. If Dr. Adam had thought that, whatever appearance the plaintiff had presented at Victoria Street, he was none the less fit to be at liberty, it was his plain duty to have acted accordingly, nor can I think that any statement made by Dr. Bond upon the telephone as to what he thought can have caused Dr. Bond to share in or be party to the judgment that Dr. Adam formed. From the time when Dr. Adam reassumed control Dr. Bond's responsibility ceased. The Court of Appeal had held that this was the time when the plaintiff actually returned to West Malling; there has been no appeal from this judgment, and it is therefore unnecessary to consider whether it did not cease at the earlier moment, when the plaintiff was placed in the charge of Dr. Adam's assistants at Victoria Street. The jury have, further, found that Dr. Bond did not honestly believe that the plaintiff was of unsound mind, and an attempt is made to explain this verdict by saying that Dr. Bond acted on the belief that the plaintiff had escaped from his brother's custody. Dr. Bond certainly had ground for such belief on the appellant's own statement to which I have referred, but whether he had or not the explanation appears to me worthless. Whatever mistake Dr. Bond may have made, I can find nothing in the evidence that on any interpretation of the word can cast the least question on his honesty, and

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I think it is to be regretted that a question should have been left to the jury in such a form that the verdict taken upon it must, in the plain meaning of the words, cast an unwarranted reflection upon Dr. Bond's character which no sophistry can explain away. One injustice cannot be remedied by committing another.

Returning now to the case against Dr. Adam, the first thing to decide is what were his powers after the plaintiff had been liberated under the probation order. I have no desire to repeat what has been already said upon this point; when once it be accepted that such an order is in the nature of an experiment to try whether a man is fit to be restored to complete liberty, it appears to me to follow that the powers conferred by the reception order, including complete control of the person named in the order, are merely in abeyance, and at any time if the custodian honestly thinks it is in the interest of the patient, the control can be resumed and the patient taken back. Any other contention would result in this: that if the patient completely broke down during the period of probation, it would require a new reception order before he could be taken back, and of this I can find no trace in the provisions of the statute. Dr. Adam was, therefore, at liberty to retake the plaintiff, and however deplorable may have been the mistakes which the verdict of the jury have decided were made, they have completely acquitted Dr. Adam in taking him back of doing any act except in what he honestly believed to be the interests of the plaintiff.

I am not impressed with the criticism about the entry in Dr. Adam's book as to the plaintiff's delusion with regard to drugs. It has never been suggested that the book was fabricated, nor is it impossible that the apprehension which the plaintiff admits he entertained after the removal of the strings of his pyjamas might have been both felt and expressed at an earlier date.

However this may be, I can find no evidence that Dr. Adam so failed in the discharge of his duties as to render him liable in damages, and I agree with the judgment of the Court of Appeal, that as against him the proceedings fail.

VISCOUNT CAVE L.C. My Lords, I am informed by my noble and learned friend Lord Atkinson that he concurs in the judgment which I have delivered.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 15, 1925.

Solicitors for the appellant: *Rooper & Whateley.*

Solicitor for the respondent Bond: *Solicitor, Ministry of Health.*

Solicitors for the respondent Adam: *Le Brasseur & Oakley.*

Solicitor for the British Medical Association: *W. E. Hempson.*

[HOUSE OF LORDS.]

DEUCHAR . . . . . APPELLANT;

AND

GAS LIGHT AND COKE COMPANY . RESPONDENTS.

H. L. (E.)* 1925 *June* 11.

Gas—Statutory Company—Statutory Powers—Incidental Powers—Express Power to convert and manufacture Residuals and to provide Materials for that Purpose—Manufacture of chemical Reagent necessary for Conversion of residual Product—Ultra vires—Gas Light and Coke Company's Act, 1868 (31 & 32 *Vict. c. cvi.*), *ss.* 40, 43—*Gas Light and Coke Company Act*, 1876 (39 & 40 *Vict. c. ccxxv.*), *ss.* 5, 64—*Gas Light and Coke Company's Act*, 1903 (3 *Edw.* 7, *c. xli.*), *s.* 13.

A statutory gas company were empowered (*a*) to make and supply gas, (*b*) to convert, manufacture, deal with and sell residuals arising from gas-making or from the materials used therein, and (*c*) to make and sell all articles produced by these means.

They were also empowered (*d*) to make and maintain gasworks, machinery, and apparatus, (*e*) to manufacture refuse and products obtained from gas-making, and (*f*) to "provide" such apparatus and "materials" as they deemed requisite for those purposes.

In order to convert their residual naphthalene into beta-naphthol (which was a marketable product) they required an outside chemical

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

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reagent—namely, caustic soda—which was neither a residual nor a product thereof:—

Held, that as no particular method of "providing" the "materials" required for converting their residuals was prescribed or prohibited, the company were impliedly authorized to manufacture the necessary amount of caustic soda for themselves, and were not bound to purchase it from the chemical manufacturers.

Decision of the Court of Appeal [1924] 2 Ch. 426 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Astbury J. (2)

The question raised by the appeal was whether the respondents, the Gas Light and Coke Company, who were admittedly entitled under their statutory powers to convert naphthalene (a residual arising in the manufacture of gas) into beta-naphthol and for that purpose to use caustic soda (the reagent necessary to effect such conversion) were entitled to provide the caustic soda required for that purpose by manufacturing it themselves or were bound to acquire it by purchase.

The material sections of the several Acts affecting the respondent company are fully set out in the report of the case before the Court of Appeal and also in the opinion of the Lord Chancellor.

The respondents had recently erected on part of their lands (being lands described in the Schedule to the Gas Light and Coke Company's Act of 1876) a factory for the manufacture by the electrolytic process of caustic soda required by them for the purpose of treating their naphthalene.

The appellant was the secretary of the Castner Kellner Alkali Company, who dealt in caustic soda, and, having for the purposes of this litigation acquired 250*l.* stock of the respondent company, he commenced an action against the company for a declaration that the manufacture by them of any chemical or other substance necessary for rendering marketable the residuals produced by the making of gas by the company was ultra vires, and for an injunction on the basis of that declaration.

(1) [1924] 2 Ch. 426. (2) [1924] 1 Ch. 422.

Astbury J. dismissed the action, and his judgment was affirmed by the Court of Appeal (Pollock M.R. and Warrington and Sargant L.JJ.).

Clauson K.C. and *Dighton Pollock* (with them *Harold Murphy*) for the appellant. The respondent company is granted a very special monopoly and its powers must be strictly construed. Being a statutory corporation it has no powers except such as are expressly conferred by the statutes by which it is regulated or by reasonable implication from the provisions of those statutes. Sect. 40 of the company's special Act of 1868 confers on the company an express power to make gas and to convert and "manufacture" a number of named residuals and all other products, refuse, or residuum produced by the making of gas and to make and sell all articles produced therefrom. It contains no express power to manufacture caustic soda, which is neither a residual nor made from a residual, but is a wholly different substance. It is said that there is an implied power to manufacture this substance, but prima facie the express power to manufacture certain other things negatives this implication on the principle of expressio unius exclusio alterius. On this section it is very difficult to imply a power to manufacture a foreign substance such as caustic soda. Sect. 43 of the same Act also authorizes the company to "manufacture" refuse and products obtained from making gas and to construct, maintain and provide the apparatus and materials required for that purpose. The company's Act of 1876 empowers the company to maintain works "for the manufacture, conversion and storage of residual products." Sect. 13 of the company's Act of 1903 empowers the company on the lands therein specified to "manufacture and deal with products, refuse and residuals remaining or obtained from making gas and coke," and to provide on the said lands such "apparatus" and "materials" as the company deems requisite for those purposes. The word "provide" might in some contexts and for some purposes include provision by manufacture, but that meaning is displaced by the

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limited rights of manufacture conferred on the company by the sections above referred to. Upon the construction of these provisions there is no implication of a right to manufacture anything except residuals and articles produced from residuals. If the powers of the company are insufficient the proper remedy is to apply to the Legislature for further powers.

Sir John Simon K.C., *W. A. Greene K.C.* and *Andrewes-Uthwatt* for the respondents were not called on.

VISCOUNT CAVE L.C. My Lords, notwithstanding the careful and complete argument which was addressed to your Lordships on behalf of the appellant, I do not feel any doubt as to the correctness of the decision of the Court of Appeal in this case.

The respondent company, the Gas Light and Coke Company, is a company formed by statute for the purpose of making and selling gas. In the course of making gas from coal the company necessarily produce a number of residual products. It is obviously undesirable that those residuals should be wasted if they can be so dealt with as to acquire a money value, and it is not disputed that the statutes under which the respondents act authorize them to convert these residuals into a marketable state. Among these residual products is a substance called naphthalene, and naphthalene can profitably be converted into beta-naphthol, a substance which is said to be used in making dyes. That conversion is best effected by the use of caustic soda, and the respondents do convert their naphthalene into beta-naphthol in that way. For a time they provided the necessary caustic soda by purchase; but recently they have commenced, presumably for purposes of economy, to manufacture it themselves. Caustic soda is made out of salt by an electrolytic process, and in the course of that manufacture chlorine is produced as a by-product. It appears from the evidence that the respondents only produce in this way so much caustic soda as is required for the purpose of converting their naphthalene into beta-naphthol, and that they only use caustic soda

produced by themselves for that purpose. Chlorine can be used for converting other residuals, but it does not appear by the evidence that the chlorine which is the by-product of the respondents' operations is used only for that purpose. It appears that, at all events, some chlorine has been converted into bleaching powder and sold.

The appellant is the secretary of another company which apparently deals in caustic soda; and, being qualified for the purpose of bringing this action by the purchase of shares or stock in the respondent company, he has taken the objection that the respondent company has no power under its statutes to manufacture caustic soda, even for use in converting its naphthalene into beta-naphthol, and he has brought this action claiming an injunction to restrain them from making caustic soda. The action was dismissed by Astbury J., and his decision has been confirmed by the Court of Appeal.

My Lords, there is no dispute as to the legal propositions which are to be applied in this case. It is enough to refer to the rule as laid down by Lord Watson in the case of *Baroness Wenlock* v. *River Dee Co.* (1), where he says this: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." I may stop there. To that statement I may add a sentence from the speech of Lord Selborne in the case of *Attorney-General* v. *Great Eastern Ry. Co.* (2), where he said this: "I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those

(1) (1885) 10 App. Cas. 354, 362.
(2) (1880) 5 App. Cas. 473, 478.

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things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Now with those statements of the law in mind I turn to the statutes in this case. The first material section is s. 40 of the Gas Light and Coke Company's Act of 1868, which commences in this way: "Subject to the provisions of this Act, the company may make and store and supply gas, and may convert, manufacture, and deal with, sell, and dispose of coke, tar, coal, pitch, asphaltum, ammoniacal liquor, oil, and all other products, refuse, or residuum arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters." Applying that section to the particular facts of this case, it appears to me to result in this, that the company may convert and deal with naphthalene, in other words, they may treat naphthalene by converting it into some other marketable product. Now it is plain that for the purpose of so converting naphthalene in the best way, you must have caustic soda, and accordingly that the provision of caustic soda is incidental to the conversion of naphthalene; and the only point is whether that caustic soda must needs be provided by the method of purchase or whether it is in the power of the company, as incidental to their power to convert, themselves to manufacture caustic soda. If that section stood alone, it would appear to me to be reasonably plain on the facts of this case that the manufacture of caustic soda is incidental to the process of converting the naphthalene into beta-naphthol, or, in other words, that the manufacture of caustic soda is a part of the process of conversion.

But the statutes do not stop there. Sect. 43 of the same Act provides that: "Subject to the provisions of this Act, the company from time to time upon the gas lands" (those are lands which are in possession of the company for the purpose of their undertaking) "may continue, make, maintain, alter, and discontinue, gasworks, buildings, retorts, gasometers, receivers, cisterns, engines, machinery and apparatus, and

may make and store gas, and may manufacture coke and other refuse and products remaining or obtained from making gas, and from materials used in or produced by the making of gas, and may construct, erect, maintain, and provide such works, buildings, machinery, apparatus and materials, and do all such things as they deem requisite for those purposes." I may stop there. Applying that section to this particular case, it appears to give power to the company to manufacture refuse and products obtained from making gas and to provide apparatus and materials for that purpose. The word "manufacture" appears there to be used in a somewhat special sense. Plainly the purpose of the Legislature cannot be to authorize the company to produce residual substances, for a company making gas cannot help producing those substances. What is meant here is that the company may work up or deal with residual products by converting them into something else, presumably into some marketable article. I think, therefore, that the section properly read does authorize the company to convert its naphthalene into beta-naphthol and to provide the necessary materials for that purpose; and again on that section I see no reason why the materials should not be provided by the process of manufacture, or why they should only be provided by the process of purchase.

Then there follows the Company's Act of 1876. Sect. 5 of that Act provides that the company may take for any purpose of their undertaking certain lands therein described and may erect and maintain works both for the manufacture and storage of gas, and for the manufacture, conversion and storage of residual products. The word "conversion" there entirely confirms the construction I have put on the earlier section. Then s. 64 of the same Act empowers the company to "purchase, construct, maintain and use all such appliances connected with the manufacture of gas, and all such works for the manufacture or distillation of the products and residuals arising from or out of the manufacture of gas, upon the lands described in the schedule as they may require or deem necessary or expedient for efficiently and economically

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carrying on their undertaking." That section supports the same view. And, lastly, there is s. 13 of the Company's Act of 1903, which is to this effect: "The company may use the lands and hereditaments referred to in Part I. of the Schedule to this Act for making maintaining altering or discontinuing or for continuing to make or maintain thereon gasworks buildings retorts gasometers receivers cisterns engines machinery and apparatus and may thereon make and store gas and make coke and manufacture and deal with products refuse and residuals remaining or obtained from making gas or coke"—then I omit some words, and the section proceeds—"and provide on the said lands and hereditaments such works buildings machinery apparatus and materials as the company deems requisite for the aforesaid purposes or any of them."

Now, my Lords, if it were, or could be, suggested that the company in this case were engaged in manufacturing caustic soda for the purpose of sale, the result might be very different; but it is quite plain, I think, upon the evidence that they are doing no such thing, that they are making caustic soda only for the purpose of using it in the process of converting one of their residuals into a marketable article. With regard to the chlorine, that appears to me to be a small matter. Chlorine is not made for the sake of making chlorine, it is a necessary by-product involved in the process of making caustic soda. Chlorine may be used for converting some residual into something which can be sold; but in any case it must be got rid of by the company somehow, and I do not think the plaintiff has said in his pleadings or that it is the fact that the company in that respect are going beyond their powers.

As a summing up of the case I would like to adopt a passage from the judgment of Warrington L.J., where he says this (1): "My view in reference to the facts of this case may be thus summed up: the defendant company have express powers to convert naphthalene into beta-naphthol; they have by reasonable implication a power to provide the proper reagent

(1) [1924] 2 Ch. 437.

for that purpose—namely, caustic soda; a proper and reasonable means of providing that substance is to make it, and, to do so not being excluded, they have by reasonable implication the power to provide the substance by that means." I entirely agree with that statement. I think that the appeal fails, and I move your Lordships that it be dismissed with costs.

LORD DUNEDIN. My Lords, I also, since I came to be in possession of the facts of the case, have not felt any doubt that the decision of the Court of Appeal was right. We were favoured with a very careful and minute analysis of the various statutes which apply to this company. Speaking for myself I do not think the case is much helped by or depends on such analysis. I look upon the subsequent statutes as merely exegetical of the leading statute of 1868, and especially s. 40 thereof; and s. 40, put into ordinary and non-technical language, seems to me very clearly to authorize the company to put the residual products into such a shape as shall make them commercially valuable.

Then we have to see whether what was done falls within the dictum of Lord Watson, which has been quoted by my noble and learned friend the Lord Chancellor. Now that dictum, I think, is only an expansion of the old brocard, "Quando aliquid conceditur, conceditur et id sine quo res ipsa esse non potest." You must have a reagent for dealing with these residual products, and I cannot see any difference between buying a reagent and providing it by manufacture in your own works. At the same time I say this, that if the case had been made that under cover of doing something incidental to the proper exploitation of waste products the respondents were really entering the market as producers of some product not itself a residual product, and thereby really becoming manufacturers of some other article than that which they were allowed to manufacture under their statutes, they might, I think, have been restrained. But no such case has been made, and I think that the appeal fails.

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LORD ATKINSON. My Lords, I concur. I think the judgment of the Court of Appeal was right and for the reasons given in the separate judgments therein.

LORD SUMNER. My Lords, I concur.

LORD BUCKMASTER. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 11, 1925.

Solicitors for the appellant: *Baker, Blaker & Hawes.*
Solicitors for the respondents: *Parker, Garrett & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1925 *May* 15.

SORRELL . . . . . APPELLANT;

AND

SMITH AND OTHERS . . . . . RESPONDENTS.

Trade—Combination to protect Trade Interests—Inducing withdrawal of Custom—Conspiracy—Threats—Absence of Intent to injure.

A combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable. If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues, provided that the purpose is not effected by illegal means.

A threat to effect a purpose which is in itself lawful gives no right of action to the person thereby injured.

A trade union of retail newsagents advocated the policy of limiting the number of retail newspaper shops in a given area, and enforced that policy by procuring its members to withdraw their custom from any wholesale newsagent who supplied newspapers to a retailer opening a new shop without its permission. Certain newcomers in a district having opened shops without the union's permission and obtained supplies of newspapers from a wholesale newsagent R., the plaintiff,

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

who was a customer of R., at the request of the union, of which he was a member, withdrew his custom from R. and transferred it to another wholesale newsagent W. The defendants, a committee representing the proprietors of the newspapers, who took the view that the union's policy was injurious to the interests of their trade, intervened at the request of R., and, in order to compel the plaintiff to return to R. as a customer, threatened to discontinue the supply of those newspapers which W. obtained directly from them, and also to discontinue the supply of newspapers to S., a wholesale newsagent who supplied W. with others of his newspapers, unless S. ceased to supply W. with newspapers so long as W. supplied the plaintiff. The defendants acted as they did for the sole purpose of protecting their trade, and were not actuated by spite against the plaintiff or by any desire to injure him. In an action to restrain the defendants from interfering with the right of the plaintiff to continue contractual relations with W.:—

Held, that the defendants had not committed or threatened to commit any wrong against the plaintiff and that the action failed.

Mogul Steamship Co. v. *McGregor, Gow & Co.* [1892] A. C. 25 and *Allen* v. *Flood* [1898] A. C. 1 applied.

Quinn v. *Leathem* [1901] A. C. 495 explained and distinguished.

Ware and De Freville v. *Motor Trade Association* [1921] 3 K. B. 40 approved and followed.

Per Viscount Cave, L.C. and Lord Buckmaster: Whether, assuming that a wrong had been committed, the plaintiff was competent to sue quaere.

Decision of the Court of Appeal [1924] 1 Ch. 506 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Russell J. (2) in an action brought by the appellant against the respondents.

The appellant was a retail newsagent of Hoxton, and previously to February 27, 1922, he obtained his newspapers from a firm of wholesale newsagents named Ritchie Brothers; but on that date, at the request of a trade union of which he was a member, he transferred his custom to another wholesale firm named Watson & Sons.

The respondents were the circulating managers of the principal London daily newspapers and acted as a committee known as the Circulating Managers' Committee. At the instance of Ritchie Brothers the respondents threatened to cut off the supply of newspapers from Watson & Sons and from W. H. Smith & Son, who also supplied Watson & Sons, unless Watson & Sons gave up supplying newspapers to the

(1) [1924] 1 Ch. 506. (2) [1923] 2 Ch. 32.

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appellant; and as a consequence Messrs. Watson & Sons terminated their contract with the appellant. Thereupon the appellant brought this action for an injunction to restrain the respondents in combination or otherwise from interfering or attempting to interfere with the right of the appellant to continue contractual relations with Watson & Sons and generally with his right to carry on business as he would.

The facts as stated by Russell J. are fully set out in the report of the case before the Court of Appeal and are summarized in the headnote.

Russell J. granted an injunction, but his judgment was reversed by the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) and judgment was entered for the respondents.

1925. Feb. 10, 12, 13, 16, 17. *Sir John Simon K.C.* and *Maugham K.C.* (with them *Arthur Henderson*) for the appellant.

The defendants have combined to interfere with the right of the plaintiff to trade as he pleases by threatening third parties to cut off their supply of newspapers unless they give up dealing with the plaintiff. Prima facie the plaintiff has a right to carry on his business in his own way, and any interference with that right is unlawful. If then the plaintiff proves that he has been deprived of the enjoyment of that right by the action of the defendants that invasion of the plaintiff's right requires justification, and the question here is whether the defendants have shown any sufficient justification. One view is that adopted by the Court of Appeal, following their decision in *Ware and De Freville* v. *Motor Trade Association* (1), that, if the defendants are acting in furtherance of their own interests and are not actuated by personal spite against the plaintiff, that is the end of the matter. The other view is, as was held by Russell J., that the absence of express malice affords no defence if the acts complained of are accompanied by threats, intimidation or coercion. In the appellant's submission, (1.) apart from conspiracy, assuming that the object of the acts complained of was to further the defendants' own interests, the use of

(1) [1921] 3 K. B. 40.

illegal methods—namely, threats and coercion—to attain that object rendered those acts illegal; (2.) in any event the combination made the acts illegal, even if they were not illegal before. *Quinn* v. *Leathem* (1) completely covers this case. In that case, as in this, the course pursued by the defendants was avowedly taken to compel the plaintiff to abandon his course of business and pressure was put upon third parties to cause injury to the plaintiff. *Quinn* v. *Leathem* (1) decides that a combination to interfere with the right of a trader to trade as he pleases by threats addressed to third parties is actionable if it causes damage to the plaintiff, and all the Lords point out the distinction between an act done by an individual and an act done by a combination. The same point had been previously decided by the Court of Appeal in *Temperton* v. *Russell* (2), which was approved in *Quinn* v. *Leathem*. (1) That decision cannot be explained upon the ground suggested by the Court of Appeal in the present case, that the object of the defendants' interference of the plaintiff's right was to injure the plaintiff and not to protect their own trade interests. In fact Lord Lindley assumes that the defendants were acting in furtherance of what they conceived to be their interests. The defendants were held liable in that case, not because the acts complained of were not done in furtherance of their own interests, but because they were accompanied by threats or coercive measures. *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) gives no support to the view that an interference with another man's trade remains legal if accompanied by threats. In *Allen* v. *Flood* (4), in the opinion of the majority, there was no question of conspiracy, intimidation or coercion, and in *Quinn* v. *Leathem* (5) Lord Lindley distinguishes that decision on this ground. In *Conway* v. *Wade* (6) Lord Loreburn, dealing with the question in what circumstances an action would lie for inducing some one not to employ or not to serve another,

(1) [1901] A. C. 495, 510, 511, 532, 535, 536, 538, 539.
(2) [1893] 1 Q. B. 715.
(3) [1892] A. C. 25.
(4) [1898] A. C. 1.
(5) [1901] A. C. 537.
(6) [1909] A. C. 506, 510.

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said: "If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action"; and that view was indorsed by the other members of the House. In *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1) Romer L.J. regards *Quinn* v. *Leathem* (2) as deciding "that a combination of two or more persons, without justification, to injure a workman by inducing employees not to employ him or continue to employ him, is, if it results in damage to him, actionable," and he then discusses what justification is required. It has never been suggested that that view is not correct. Protection of trade interests may be combined with an action the natural consequence of which and the presumed intention of which is the injury of the plaintiff. The test then is: Is there a justification for interfering with the prima facie rights of the plaintiff? Upon the principle laid down by Lord Macnaghten in *Quinn* v. *Leathem* (3), by Lord Watson in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (4), and by Lord Dunedin in *Mackenzie* v. *Iron Trades Employers' Insurance Association* (5), the defendants have invaded the legal right of the plaintiff without any sufficient justification.

[They also referred to *Larkin* v. *Long* (6); *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (7); and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (8)]

Clauson K.C. and *Wilfrid Greene K.C.* (with them *Dighton Pollock*) for the respondents.

The defendants alleged, first, that the plaintiff had no cause of action; secondly, that, assuming justification was necessary, the justification was sufficient. The Court of Appeal decided the second point in the defendants' favour, and therefore they did not consider the first point. It would be enough for the defendants to win on the second point,

(1) [1903] 2 K. B. 600, 618.
(2) [1901] A. C. 495.
(3) [1901] A. C. 510–11.
(4) [1892] A. C. 41–43.
(5) 1910 S. C. 79, 82.
(6) [1915] A. C. 814, 829.
(7) (1898) 35 S. L. R. 645.
(8) [1905] A. C. 239.

but the argument in support of the appeal makes it necessary to deal with both points. Therefore it is submitted, in the first place, that the defendants have done nothing illegal. It is conceded that no man is entitled by illegal means to interfere with the plaintiff's method of earning his living. But what are illegal means? These include, first, means illegal in themselves—namely, such means as if employed by an individual would give rise to an action of tort by a person thereby damaged; but they may include something more—namely, means which, though legal in themselves when used by an individual, become illegal when used by two or more persons acting in a tortious combination. Then, what is the test whether a combination is innocent or tortious? A combination is innocent if the means used by two or more persons are just as innocent as the means used by one. The test is to be found in the motive of the combination—i.e., its immediate object or purpose. Motive in an individual is to be put out of account. But in the case of a combination the test is whether the motive is to do harm to an individual. The result of the *Mogul* case (1) is accurately stated by Lord Dunedin in *Mackenzie* v. *Iron Trades Employers' Insurance Association* (2) as follows: "Every one has the right to carry on his own business upon his own lines, and as suits him best, even though the result may be that he interferes with other people's business in so doing." In the *Mogul* case (1) your Lordships were of opinion that the immediate object of the defendants was not to injure the rival traders, but to carry on their own business in the most advantageous way to themselves. In *Quinn* v. *Leathem* (3) there was a finding of an immediate intent to injure the plaintiff in his trade, and both Lord Halsbury and Lord Macnaghten relied on that wrongful purpose. That decision falls entirely into line with the previous authorities, that a combination of traders the direct object and purpose of which is not to serve their own interest as traders, but to injure the plaintiff, is illegal, although there would be no illegality in the case of an

(1) [1892] A. C. 25. (2) 1910 S. C. 79, 82.
(3) [1901] A. C. 495.

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individual. It follows that the doctrine of *Allen* v. *Flood* (1) applies only to an individual. In the *Mogul* case (2) the Lords were considering what was the motive of the combination, and they contemplated that a combination of traders for the purpose of injuring another in his trade and not for the furtherance of their own trade would give a right of action. That the lawfulness of a combination is determined by the motive with which it is entered into is laid down by Lord Dunedin in 1906 in the report of the Royal Commission on Trades Disputes, of which he was chairman. And see *Boots* v. *Grundy* (3) per Phillimore J.; *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (4); *White* v. *Riley* (5); *Reynolds* v. *Shipping Federation*. (6) In *Ware and de Freville* (7) both Scrutton and Atkin L.JJ. base the decision of *Quinn* v. *Leathem* upon a conspiracy to injure the plaintiff. It is said that that case laid it down that any interference with a man's right to trade as he likes is prima facie a legal wrong, and that if that interference is accompanied by threats it is actually a legal wrong. Both those contentions are directly opposed to the law as laid down by Lord Herschell in *Allen* v. *Flood*. (8) Lord Herschell there states the law to be that an interference with the plaintiff's trade to be actionable must be unjustifiable, not that the interference is prima facie wrong and requires justification. A manufacturer may supply his goods to the wholesaler on such terms as he thinks fit. He may stipulate that he will only supply goods to the wholesaler on the terms that the latter shall not supply a particular retailer, and he may withhold the supply to the wholesaler if those terms are not agreed to. But all those acts involve an interference with the trade of another. The plaintiff has no right to compel other people to carry on business with him, and to procure the withdrawal of their custom is not of itself an infringement of his rights. So too a workman may impose

(1) [1898] A. C. 1.
(2) [1892] A. C. 25.
(3) (1900) 82 L. T. 769.
(4) 35 S. L. R. 645.
(5) [1921] 1 Ch. 1, 15, 31.
(6) [1924] 1 Ch. 28, 39.
(7) [1921] 3 K. B. 40.
(8) [1898] A. C. 1, 129, 138.

such terms as he chooses on his labour, otherwise every strike would be unlawful. He may say to his employer, "I will not work for you unless you get rid of A. B." In *Quinn* v. *Leathem* (1) the defendants were outsiders coming into the dispute and were not disposing of their own labour. Lord Herschell also deals with the question of threats. A threat is not unlawful in itself; it is only unlawful if the course proposed is unlawful. Otherwise if a trader cut off supplies without notice no action would lie, but if he gave warning that he was going to do so an action would lie: see *Hodges* v. *Webb* (2); *White* v. *Riley*. (3) To sum up: (1.) The acts of the defendants gave rise to no right of action; in combination they were doing lawful acts without the object or purpose of injuring the plaintiff. (2.) If those acts required justification, the defendants had just cause or excuse for their conduct. In this case, from beginning to end, there is no element of tort or illegality, combination or no combination.

LORD BUCKMASTER referred to *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (4)

Sir John Simon K.C. in reply.

Quinn v. *Leathem* (1) in the House of Lords does not turn upon illwill, but turns upon the question whether the defendants acting in combination were using unlawful means. It shows: (1.) That it is a legal wrong to employ unlawful means to interfere with the plaintiff's business; (2.) that coercion as the result of threats addressed to third parties is such unlawful means; (3.) that the element of combination is important in deciding whether what is called a threat is coercion; (4.) that in such circumstances self-interest is no justification for such coercion. Unlawful means is satisfied by coercion as the result of threats to third parties, even though the persons using the threats are threatening something which as between themselves and the third parties they are legally entitled to do: *Pratt* v. *British Medical Association*. (5)

The House took time for consideration.

(1) [1901] A. C. 495.
(2) [1920] 2 Ch. 70, 86 et seq.
(3) [1921] 1 Ch. 1.
(4) [1913] A. C. 781, 793, 795, 797.
(5) [1919] 1 K. B. 244, 262-3.

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1925. May 15. VISCOUNT CAVE L.C. My Lords, the facts of this case are clearly stated in the judgment of Russell J., and for present purposes they may be very briefly summarized. The publishers of the London daily newspapers supply their papers to wholesale newsagents, who in their turn supply them to retail newsagents for sale to the public. The retail newsagents have a trade union known as the National Federation of Retail Newsagents, Booksellers and Stationers, and that federation has for some time advocated a policy which they call the "distance limit policy," and which is described by the learned judge as a policy for preventing newcomers from opening shops for the retail sale of newspapers in any area where the supply of newspapers is, in the opinion of the federation, already sufficiently provided for. The interests of the publishers as regards the circulation of their newspapers are looked after by the respondents, who are a committee of the circulation managers of the London dailies, and the "distance limit policy" of the retail federation does not commend itself to the respondents, who probably look to free competition among newsagents as tending to increase sales.

Early in the year 1922 some newcomers commenced selling papers in a London area which, in the opinion of the London district council of the retail federation, was already sufficiently equipped with retail newsagents, and these newcomers obtained their supplies of papers from a firm of wholesale newsagents called Ritchie Brothers, of Shoe Lane. Thereupon the London district council took action in support of their policy. Having failed to persuade Messrs. Ritchie to stop supplies to the newcomers, they, on February 15, 1922, held a special meeting of the branch presidents and secretaries of their London district, at which a resolution was passed in the following terms: "That we ask one member from each branch to volunteer to withdraw his supply from Ritchie on any of the ground he covers, and further action be taken to draw him into line with other wholesalers on the distance limit policy." On the same day a meeting of the Shoreditch branch of the federation was held, and the secretary of that

branch, who had attended the meeting of presidents and secretaries held by the district council, explained what had occurred at that meeting and asked for volunteers to take action against Ritchie Brothers in the manner described in the above resolution. The appellant, Mr. Sorrell, who was a retail newsagent at Hoxton and was obtaining his supplies from Ritchie Brothers, was a member of the Shoreditch branch, and was present at the branch meeting, and after a number of speeches had been delivered he volunteered to take the action desired. Accordingly, on February 20, the appellant gave notice to Ritchie Brothers that he would not require papers from them after February 27, and on the latter date he transferred his custom to other wholesale newsagents—Messrs. Watson, of Dalston Lane. It is suggested that it was convenient to the appellant to deal with Watson's rather than with Ritchie's because Watson's were nearer to his shop and gave him slightly better terms; but it was found by the learned judge that what decided the appellant to leave Ritchie was the call for volunteers at his branch. None of the newcomers who had been supplied by Ritchie were within the area of the appellant's trade.

On receiving the appellant's notice, Ritchie Brothers, who were apparently aware of the purpose of the move, asked the respondent committee to take the matter up, and thereupon the committee (to put it shortly) told Watson's that, unless they ceased to supply the appellant with newspapers, the supply of papers to them would be stopped. They also communicated with Messrs. W. H. Smith & Son, through whom some of the papers were being supplied to Watson's, and requested them to stop the supply to Watson's unless Watson's ceased to supply the appellant. This pressure proved effective, and on March 24 Watson's wrote to the committee stating that they would discontinue the appellant's supplies of daily newspapers after March 25. A question arose as to the appellant being entitled to a longer notice of discontinuance, and on March 25 Watson's gave to the appellant a notice of discontinuance expiring on April 1. On March 28

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the appellant issued the writ in this action, claiming an injunction restraining the respondents in combination or otherwise from procuring or attempting to procure a breach of contract between the appellant and Watson's, or from interfering or attempting to interfere with the right of the appellant to enter into or continue such contracts or contractual relations with Watson's as he willed or generally with his right to carry on his business as he willed and claiming damages.

The action was heard by Russell J., who after reciting the above events, summed up his conclusions of fact as follows (1): "From the above recital the following facts emerge: (1.) The plaintiff at the request of his branch ceased to deal with Ritchie's, because Ritchie's were supplying newcomers who, in the opinion of the retail federation, were persons to whom the distance limit policy should be applied. (2.) The defendants at the request of Ritchie's and in combination intervened, and for the purpose of securing that the plaintiff should return to Ritchie's as a customer brought pressure to bear on Watson's to discontinue their supplies to the plaintiff. (3.) This pressure was exerted on Watson's in part directly, by threatening to discontinue supplies to Watson's, and in part indirectly, through W. H. Smith & Son, by threatening to discontinue supplies to W. H. Smith & Son if they did not discontinue supplies to Watson's so long as Watson's continued to supply the plaintiff. In other words, the defendants combined to bring it about by threats that Watson's should refuse to deal with the plaintiff—that is, they combined to interfere, by coercion of Watson's, with the trade of the plaintiff, with his right to carry on his business as he would, and to deal with such people as he thought fit. I will add this additional fact, of which I am upon the evidence satisfied, that in acting as they did the defendants were not actuated by any spite against the plaintiff, or by any intention or desire to injure him. They desired that he should take back his custom to Ritchie's; they were quite unaware of the fact, if it be the fact, that it was to the plaintiff's

(1) [1923] 2 Ch. 41.

advantage, pecuniarily and otherwise, to deal with Watson's rather than with Ritchie's."

He added that in his view of the evidence no case arose of the defendants combining to procure a breach of any contract between the plaintiff and Watson's, and that no breach of contract had in fact taken place. Under an undertaking given to the Court, Messrs. Watson had continued to supply the plaintiff, and accordingly no question of damages arose at the trial and the application was for an injunction only. Russell J., in a careful judgment, expressed the opinion that the case of *Quinn* v. *Leathem* (1) had decided that a combination of two or more to induce by threats a man's customers not to deal with him was, if damage resulted, actionable, unless justification existed, and that the decision did not, in his opinion, depend upon the existence in the combination of an intent to injure; and, holding that there was no sufficient justification for the action of the defendants, which he attributed solely to their desire to have the final voice in each case as to the application of the "distance limit policy" of the retail federation, he granted an injunction.

On appeal from this judgment the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.), following the decision of the same Court in *Ware and De Freville* v. *Motor Trade Association* (2), held that an intent to injure was an essential part of the offence charged, and being of opinion that the defendants had taken action, not for the mere purpose of obtaining control of the "distance limit policy," but in order to protect their trade interests by securing a free sale of newspapers, they held this to be a sufficient justification for the defendants' action. They accordingly reversed the judgment given for the plaintiff, and ordered judgment to be entered for the defendants with costs. The plaintiff thereupon appealed to this House.

My Lords, the argument on this appeal ranged over a wide field and involved the examination of a large number of authorities, including the famous trilogy of cases in your

(1) [1901] A. C. 495. (2) [1921] 3 K. B. 40.

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Lordships' House: *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1); *Allen* v. *Flood* (2); and *Quinn* v. *Leathem.* (3) Such an examination is of no value, unless it yields some general principle or test which may be of service in deciding other cases; and from these authorities, which I have carefully read and considered, I deduce as material for the decision of the present case two propositions of law, which may be stated as follows:—

(1.) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.

To quote the material parts of the long series of judgments upon which the above conclusions are based would be an endless task, but an attempt to classify the more important of them may be of service. The first proposition is at least as old as *Garret* v. *Taylor* (4), and appears in many later cases; and although it seemed for a moment to be obscured by some observations made in the judgments in *Allen* v. *Flood* (2), it was (I think) fully re-established in *Quinn* v. *Leathem* (3), where Lord Halsbury said that, if upon the facts there found (which fell within the above definition) the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community. The first proposition is further illustrated by the cases of *Gregory* v. *Duke of Brunswick* (5); *Temperton* v. *Russell* (6); and *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and*

(1) [1892] A. C. 25.
(2) [1898] A. C. 1.
(3) [1901] A. C. 495.
(4) (1620) Cro. Jac. 567.
(5) (1843) 6 Man. & G. 205.
(6) [1893] 1 Q. B. 715.

Ireland. (1) The second proposition was fully established in the *Mogul* case (2) and in *Allen* v. *Flood* (3); and effect was given to it in *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (4); *Mackenzie* v. *Iron Trades Employers' Insurance Association* (5); *Ware and De Freville* v. *Motor Trade Association* (6); and *Reynolds* v. *Shipping Federation.* (7) Both propositions were stated by Bowen L.J. with characteristic lucidity in the *Mogul Steamship* case (8), and were summarised by Lord Parker in *Attorney-General for Australia* v. *Adelaide Steamship Co.* (9) In enumerating these authorities I have not included cases where the defendants had procured a breach of contract, as those cases stand on a special footing, and in the present case no such breach was procured. Among these cases are *Lumley* v. *Gye* (10); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (11); *Conway* v. *Wade* (12); and *Larkin* v. *Long.* (13)

To the text of the above general propositions I would add the following footnotes :—

(*a*) Although the first proposition is confined to a combination of two or more, it does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one, and that the circumstance that two or more persons combine to cause the injury, while it may be very relevant as evidence of the purpose and as an aggravation of the damage, is not itself an essential element in the cause of action: see the opinions expressed by Palles C.B. in *Kearney* v. *Lloyd* (14) and by Romer L.J. in the *Giblan* case (15); and see also *Huttley* v. *Simmons.* (16) But in the present case, where a combination clearly existed,

(1) [1903] 2 K. B. 600.
(2) [1892] A. C. 25.
(3) [1898] A. C. 1.
(4) 35 S. L. R. 645.
(5) 1910 S. C. 79.
(6) [1921] 3 K. B. 40.
(7) [1924] 1 Ch. 28.
(8) (1889) 23 Q. B. D. 598, 612.
(9) [1913] A. C. 781, 793.
(10) (1853) 2 E. & B. 216.
(11) [1905] A. C. 239.
(12) [1909] A. C. 506.
(13) [1915] A. C. 814.
(14) (1890) 26 L. R. Ir. 268, 280.
(15) [1903] 2 K. B. 600, 619.
(16) [1898] 1 Q. B. 181.

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this question does not arise; and accordingly I express no opinion upon it.

(*b*) In some cases "malice" is postulated as an element in the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connection. But there is a tendency to interpret "malice" as connoting personal enmity or spite or some other evil motive; and as such a motive is neither an essential element in the offence nor conclusive of the offence having been committed, it seems better to forego the use of the word.

(*c*) The second proposition, of course, assumes the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality; but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultroneously to injure the trade of another: see, on this point, *Hodges* v. *Webb* (1) and *White* v. *Riley* (2); and the observations of Holmes J. in the American case of *Vegelahn* v. *Guntner*. (3)

(*d*) There is here no question of a "trade dispute" within the meaning of the Trade Disputes Act, 1906. The quarrel here is not between employer and workman or between workman and workman, but between trader and trader. The above observations, therefore, are not directed to such a case.

My Lords, if these conclusions are applied to the present case, it is not difficult to arrive at a decision upon this appeal.

(1) [1920] 2 Ch. 70. (2) [1921] 1 Ch. 1.
(3) (1896) 167 Mass. 92.

That the defendants combined in a proceeding, the necessary effect of which would have been to injure the plaintiff in his trade unless he submitted to their conditions, may be assumed; but did they do so for the purpose of injuring the plaintiff in his trade, or was it their purpose and object to forward or defend their own trade? I am satisfied that the latter is the true view. The learned trial judge found as a fact that the defendants were not actuated by any spite against the plaintiff or by any intention or desire to injure him. Their purpose was to defeat the "distance limit policy" of the retail federation, which they considered injurious to the free sale of their newspapers; and because the plaintiff, at the instance of the retail federation and in concert with them, was endeavouring to forward that policy by withdrawing his custom from Ritchie's, the defendants, as a counter move, declined to supply Watson's with papers which they could hand on to the plaintiff. Both moves were episodes in a trade war which was being waged between the retailers of newspapers on the one hand and the producers and wholesalers on the other, and were adopted in the supposed interests of one or the other side. Stroke and counter stroke, whether wise or not, were equally prompted by a desire to forward or protect trade interests. The plaintiff struck the first blow, and when it was countered by a similar blow struck by the defendants ran to the Court for protection. His attitude recalls the saying of a French author: "Cet animal est très méchant; quand on l'attaque, il se défend." Apparently he forgot that if the defendants were acting illegally then so was he, and that if he was acting illegally a Court of equity would hardly be disposed to help him. I think that in this case it was proved that the defendants took action for the sole purpose of protecting their own trade, and accordingly that they have not committed or threatened to commit any wrong and are not liable to any proceedings.

For these reasons, which substantially agree with those given by the learned Lords Justices in the Court of Appeal, I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

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My Lords, my noble and learned friend, Lord Atkinson, desires me to say that he concurs in this judgment.

LORD DUNEDIN. My Lords, this is a case of great importance not only to the parties themselves, but for the effect which your Lordships' judgment may have on future cases. Indeed, Russell J. and Bankes and Scrutton L.JJ., embodied in their judgments an appeal for guidance so touching as to recall the prayer of Ajax—'Εν δε φάει καὶ ὄλεσσον—" Reverse our judgment an it please you, but at least say something clear to help in the future." In the state of the authorities this is, I think, a reasonable request. It may not be easy to comply with, but for my own part I shall do my best. The case was admirably argued on both sides, which makes the task an easier one.

My Lords, the question at the root of such cases is in what kind of concerted action which brings injury to an individual as its result can the proceedings be restrained at law or damages given for the injury done? The case is necessarily different from that of injury effected by the action of an individual. When A. by his action causes loss to B., the sole question is, was A.'s action a tort? and the law as to what is and what is not a tort may be said to be well settled. With any law, however well settled, difficulties may and do still arise in its application to the ever varying kaleidoscope of circumstances. But except for that there cannot be said to be much difficulty in the law of tort. One noticeable attempt for its extension was put an end to by *Allen* v. *Flood*. (1) I shall have to revert to that case, but in its application to action by an individual, and that was all that as a decision it dealt with, it settled that the only question was, was there a tort? and that in the solution of that question the motive of the doer of the act had no significance.

Passing, therefore, to the case of concerted action, the first and obvious observation is that if a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage.

(1) [1898] A. C. 1.

But when there is nothing done which per se would be a tort, then one is at once faced by the consideration that a particular thing done, not in itself a tort, may, if done by an individual, be supportable though unpleasant, but may, if done by many in concert, become insupportable and create a real injury. This truism has been recognized by many learned judges. As example may be given the words of Lord Halsbury in *Allen* v. *Flood* (1), and many other passages might be quoted.

My Lords, I am tempted to consider what, in face of that fact, one would feel inclined to lay down as the law if there were a clean slate and the books held no authority on the subject. I think I should say to a jury you must consider whether the act or acts complained of which caused loss and hurt to the plaintiff were done with the purpose of injuring the plaintiff. Was such a purpose the real root of the acts that grew from it, or was the true motive of the acts something else, such, as for instance, the furtherance of the defendant's own business? I have avoided the use of the words "legitimate" and "wrongful," which are so often used. When used by way of legal definition I say, with the utmost respect for all the learned judges who have so frequently used them, that they seem to me really to beg the question; but if used in giving directions to a jury I do not think they would be hurtful, for, in truth, in asking a jury to decide between the two alternatives you are not able to give strict legal definition, you are really appealing to that inner standard of right and wrong, that something which is not exactly conscience, but which, I think, is best expressed by the French term "for intérieur"; and it is by the arbitrament of that standard that a jury will decide between the two alternatives. I believe the question as I have put it would elicit a satisfactory answer, and that that answer would, in accordance with the law, allow a verdict to be entered for the plaintiff or the defendant. Alas, however, the slate is not clean; on the contrary, the books are full of decisions, so many and so various that it would be an impossible task to reconcile either the decisions or the dicta. Sitting in your Lordships' House,

(1) [1898] A. C. 1.

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I am not bound by much that has been said and decided, but I am bound by the decisions of this House, and I therefore propose to see whether the question I have put can be reconciled with authority. The difficulty is enhanced by the fact that not only are there the authorities themselves, but there is a mass of commentary on what the authorities really come to, and many of the commentaries do not agree.

My Lords, while in the Court of Session I had occasion to deal partly with this subject in the case of *Mackenzie* v. *Iron Trades Employers' Insurance Association*. (1) That case was not brought before the notice of the Court of Appeal either in this case or in the case of *Ware and De Freville* v. *Motor Association* (2), on which this case has proceeded, but before your Lordships it was quoted as an authority in their favour by each of the opposing counsel. At first I was afraid I must have expressed myself with the studied ambiguity of the Delphic oracle, but on further reflection I came to see that the learned counsel really agreed that it rightly stated the law, as far as it went, and as after reconsideration I adhere to what I then said, and as the passage is not long, I shall venture to repeat it here: "There is a great deal of authority and law upon this subject. I cannot say that the subject can be called an easy one, and, when the subject is not an easy one, the application of the law to the particular circumstances is always difficult. But I think the three leading cases upon the subject, without any doubt, are the well known cases of the *Mogul Steamship Company* v. *M'Gregor, Gow & Company* (3), of *Allen* v. *Flood* (4), and of *Quinn* v. *Leathem*. (5) Now, the result of those cases, in my mind, is this: In the first place, every one has the right to conduct his own business upon his own lines, and as suits him best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. (3) Secondly, an act that is legal in itself will not be made illegal because

(1) 1910 S. C. 79, 82.
(2) [1921] 3 K. B. 40.
(3) [1892] A. C. 25.
(4) [1898] A. C. 1.
(5) [1901] A. C. 495.

the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood*. (1) Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem*." (2)

Now I said "as far as it went," for in that case I next proceeded to point out that conspiracy was not alleged. The case therefore stopped short of throwing light on what we have now to decide, but I think it correctly sums up, in a very short way, the import of the three decisions—the *Mogul* case (3); *Allen* v. *Flood* (1); *Quinn* v. *Leathem*. (2) That brings me to what I consider the leading heresy which is to be found in some judgments and text writers—namely, to use the words of McCardie J., in *Pratt* v. *British Medical Association* (4), when, in speaking of *Quinn* v. *Leathem* (2), he says: "The element of conspiracy seems to have been a merely incidental feature of that case." Practically the same was said in this case by Russell J. In rejecting such a view, I entirely concur with what was said by Atkin L.J. in *Ware and De Freville*. (5) "It appears to me," he says, "to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2) is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another."

I have read and reread the judgments in *Quinn* v. *Leathem* (6), and I confess I found it very hard to understand how any one could come to the conclusion that conspiracy

(1) [1898] A. C. 1.
(2) [1901] A. C. 495.
(3) [1892] A. C. 25.
(4) [1919] 1 K. B. 244, 260.
(5) [1921] 3 K. B. 40, 90.
(6) [1901] A. C. 479, 500.

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was only a side issue instead of being, as I think it clearly was, the very gist and essence of the decision. But as the view has not only been stated but has gained many adherents, I think it better to give the reason for my opinion. Now in the first place the question technically before the House was whether to reverse or affirm a judgment of the Court of Appeal in Ireland which had affirmed a judgment of a Divisional Court which had refused a motion "to set aside the verdict and judgment and enter a verdict for the defendants; or, in the alternative, for a new trial on the ground of misdirection," and then follows a statement of the various ways in which it was said the learned judge had misdirected the jury.

This sends us back to the verdict and the charge. Specific questions were put by the judge, of which 1 and 2 were as follows (the other questions as to the Black List may be disregarded): "(1.) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. (2.) Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so?—Answer: Yes."

I have little doubt that it is to the existence of this finding No. 1, that the opinion has been formed that the final judgment was independent of conspiracy. Now the trial took place in 1896 and *Allen* v. *Flood* (1) was not decided in this House until December, 1897. At the date of the trial there was ample authority for the proposition that, if anything is done for the direct purpose of injuring the plaintiff or to benefit the defendants at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong and therefore a wrongful act, and therefore an actionable act if injury ensues from it and that apart from conspiring: *Bowen* v. *Hall* (2) by Brett L.J. and *Temperton* v. *Russell.* (3)

(1) [1898] A. C. 1. (2) (1881) 6 Q. B. D. 333, 338.
(3) [1893] 1 Q. B. 715, 728.

But the learned judge, after discussing the words "wrongful" and "malicious," went on to charge the jury as follows: "Finally, I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade."

The verdict as applied was supported by both the findings, but by the time the motion to set aside the verdict came before the Divisional Court and afterwards the Court of Appeal, *Allen* v. *Flood* (1) had been decided, and consequently it will be found that the whole argument turns on whether *Allen* v. *Flood* (1) really applies to actions of conspiracy. Andrews J. and Lord Ashbourne C. (2) point out that there was no question of conspiracy in *Allen* v. *Flood.* (1) Holmes L.J. also characterised what had been done as a criminal conspiracy. I do not mention Porter M.R., because I think, as his reference to *Reg.* v. *Druitt* (3) shows, his judgment turned rather on the use of illegal means. When the case came to this House the counsel for the appellant clearly saw that in order to apply the judgment of *Allen* v. *Flood* (1) to this case, it was necessary to make out that conspiracy made no difference. *Allen* v. *Flood* (1) had carried them through the difficulties of the first finding, if that finding is read as I have read it, independent of conspiracy, but it did not carry them through the second, unless conspiracy made no difference, and accordingly in their argument I find this (4): "An act which is not in itself

(1) [1898] A. C. 1.
(2) [1899] 2 I. R. 675, 752.
(3) (1867) 10 Cox, C. C. 592.
(4) [1901] A. C. 502, 503.

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actionable does not become so because the motive is malicious or bad : *Allen* v. *Flood* (1), nor because it is done in combination by two or more, or by the conspiracy of several, unless the conspiracy be criminal. There is no question of criminality here." And again, " It is an old fallacy to argue that though one man may legally injure another, the same act in several combined is illegal because several can do more mischief than one. It is not true : some men are a host in their individual selves : are lions ; some multitudes are asses : e.g., Napoleon : Bismarck : and the nations whom they crushed."

When it comes to judgment, Lord Halsbury C. in his very opening sentences puts it as a case of conspiracy. Lord Halsbury had been in the minority in *Allen* v. *Flood* (1), and he protests against *Allen* v. *Flood* (1) being carried beyond its own facts. Lord Macnaghten explained with great clearness the import of *Allen* v. *Flood*. (1) It had, he explained, laid down no new law, but he said the headnote might have been taken from the words of Parke B. in *Stevenson* v. *Newnham* (2): " An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." And then he explains that what *Allen* v. *Flood* (1) had done was to sweep away the erroneous proposition laid down by Brett L.J. in *Bowen* v. *Hall* (3) and *Temperton* v. *Russell* (4), the very proposition on which, as I have above remarked, the first question and finding viewed as not being a conspiracy could be founded. That view, therefore, really leaves the conspiracy finding No. 2 as the only finding remaining. Speaking of Lord Watson's judgment in *Allen* v. *Flood*, he says (5) : " Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." Applying this to the facts of *Quinn* v. *Leathem*, it is obvious that as a mere question of

(1) [1898] A. C. 1.
(2) (1853) 13 C. B. 285, 297.
(3) 6 Q. B. D. 333.
(4) [1893] 1 Q. B. 715.
(5) [1901] A. C. 510, 511.

an act by itself Munce might at any moment have refused to take Leathem's beef and no wrong would have been perpetrated. Further on Lord Macnaghten says: "That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen L.J. and Lords Bramwell and Hannen in the *Mogul* case. (1) A man may resist, without much difficulty, the wrongful act of an individual . . . . but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong."

All this is right in the teeth of the argument for the appellant quoted above.

My Lords, I need not multiply citations. Lord Shand goes on combination and conspiracy alone, so does Lord Brampton. I cite only one sentence (2): "I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action."

To sum up. There are some observations in Lord Lindley's judgment which might seem to point to another ground of action, and Lord Halsbury proceeds on the ground of threats, which in that case he regarded as illegal means or, in other words, tortious acts, as well as a conspiracy to injure. But as regards the others, Lord Macnaghten demolished in terms every finding as the basis of the verdict except the finding of the conspiracy, and in the judgments of all the others, all, save conspiracy, has passed out of sight. In fact, I indorse what was said by Atkin L.J. in *Ware and De Freville.* (3) "The case seems to me not to turn in any degree on the evidence as to threats. The foundation of the decision was the principle, expressly reserved in the decision in *Allen* v. *Flood* (4), that a combination to injure may be unlawful where the intention by one is not."

My Lords, it may seem self confident to be positive when so many learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now

(1) [1892] A. C. 25.
(2) [1901] A. C. 522.
(3) [1921] 3 K. B. 90.
(4) [1898] A. C. 1.

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express, that the effect of *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2) is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy. If that be so, the form of question which at first I indicated as what I should put to a jury is justified by the authorities.

Before finally leaving the subject, it may be well to point out that all through the *Mogul* case (3) it was clearly indicated that if the facts had raised conspiracy to injure, the result would have been different. Thus Lord Watson says: "If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships." But no such thing is pointed out by the acts disclosed in that case, and Lord Bramwell, speaking of what might have been urged if the acts had been different, speaks of it then as an indictable conspiracy.

It is a very natural question to ask why should motive or intention be immaterial in the case of an act done by one and yet go to make the whole difference when the act is done by a combination of persons? And here I had better explain that though it is easy on the strict view of the meaning of the words to draw a distinction between motive and intention yet the meaning of the one runs into the other, and in the set of cases I have quoted I think they are used as synonymous. *Cf.* e.g. the word "intent" as used by Parke B. in *Stevenson* v. *Newnham* (4) adopted by Lord Macnaghten in *Quinn* v. *Leathem* (5), though Lord Macnaghten himself had used the word "motive" at p. 131

(1) [1898] A. C. 1.
(2) [1901] A. C. 495.
(3) [1892] A. C. 25, 42.
(4) 13 C. B. 285, 297.
(5) [1901] A. C. 509.

of *Allen* v. *Flood*. I notice also that Lord Watson at p. 94 of *Allen* v. *Flood* says "a bad motive, namely an intention to injure" and at p. 108 uses the word "animus," which word covers both motive and intention. Yet I do not think that one is driven to take refuge in the well known shelter provided by Lord Halsbury when he pointed out that law was not a logical science.

Your Lordships are aware, for it was brought before your notice both by the judgments in the case and by the learned counsel who argued it, that in 1906 I sat as chairman of a Royal Commission on Trade Disputes, and that to the report of that commission there were appended some papers dealing with decided cases which were the joint work of the late Mr. A. Cohen and myself. My Lords, I have very carefully reconsidered what was then said, and I do not find it necessary to say that I have changed my opinion. In that report we who were of the majority said this: "Whether there can truly be a civil action of conspiracy on facts which fall short of criminal conspiracy cannot be said to be settled. We have carefully considered the matter and our view is in the negative." That view is expounded in a memorandum on the civil action of conspiracy. The only slight change which I would make is that in the comments on *Gregory* v. *Duke of Brunswick* (1) I am not inclined now to put so much stress on the idea of creating a riot as on the purpose to injure the actor and ruin his career by organized and concerted hissing. I beg leave to refer to that memorandum. I have also quoted from the judgments in the Courts below, in *Quinn* v. *Leathem* (2), some direct pronouncements to the same effect. Now the moment that that is recognized, i.e., that the essence of conspiracy on which civil action is founded is a criminal conspiracy, though of course unless actual damage has followed no civil action will lie, the moment that fact is recognized, you at once bring in the spirit of the criminal law, where motive or intention—the mens rea—is everything. As Lord Lindley said in *Quinn* v. *Leathem* (3): "It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention"; and

(1) 6 Man. & G. 205. (2) [1901] A. C. 495. (3) [1901] A. C. 533.

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it is just the motive or intention, the mens rea, that makes the difference between a combination which is innocent, even although it inflicts damage, e.g., the *Mogul* case (1), or a combination which, as it was based on a mens rea, a desire to injure, becomes conspiracy, e.g., *Quinn* v. *Leathem*. (2) Whether what a man does is, to use the not accurate, as I think, but still convenient phrase, in the legitimate furtherance of his own business, is really no more than a piece of evidence which enables the jury to answer the question I put at the beginning, one way or the other. I would like to add that to say that a conspiracy to found the civil action must be a criminal, i.e., an indictable conspiracy, is not tantamount to saying that in each and every case you might expect a jury if the case were tried in a criminal court to return a verdict of guilty. In many cases they might and probably would think that the civil remedy was sufficient.

My Lords, this brings me to a criticism which I would much sooner not make, because in a sense it is hypercritical, but which I must make in order to maintain the logic of this opinion. This criticism is as to the way, in some parts of their opinions, the learned judges in the Court of Appeal (always excepting Atkin L.J.) have expressed themselves in this case and in the case of *Ware and de Freville* (3) on which this case is founded. There are many phrases in their opinions which express the rule exactly as I have done, e.g., Bankes L.J. in *Ware's* case says: "The decisions in *Mogul Steamship Co.* v. *McGregor* (1), *Allen* v. *Flood* (4) and *Quinn* v. *Leathem* (5) are all in agreement to this extent, that a combination of persons to do some act the object of which is to injure some third person is wrongful and actionable; so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person." And then he goes on to say that there was no evidence to justify a verdict of conspiracy such as was obtained from the jury in *Quinn* v. *Leathem*. (5) But there are other passages where the question is expressed as being whether

(1) [1892] A. C. 25.
(2) [1901] A. C. 533.
(3) [1921] 3 K. B. 40, 56, 61.
(4) [1898] A. C. 1.
(5) [1901] A. C. 495.

the defendants have "justified" their action. At p. 61, Bankes L.J. says: "The question in the present case is not so much whether the plaintiffs have made out a prima facie case as whether the defendants have justified their action." He cites Lord Bowen's expressions in the *Mogul* case. (1)

But it must be noted, as pointed out by Mr. Cohen and myself in the memorandum, that when Bowen L.J. (as he then was) penned the sentence quoted, he was bound by *Bowen* v. *Hall* (2) in the Court of Appeal, for *Allen* v. *Flood* (3) had not yet been decided in this House, and what he said was right if *Bowen* v. *Hall* (2) in its major proposition was good law. The same phrase as to justification is used by other learned judges.

Now I again say I am sorry thus to criticise, because I feel that in substance the learned judges are applying the same standard as I am, but my excuse for the criticism lies chiefly in this, that their way of expressing the question formed, if I may use the phrase, the jumping off place for the very able and clear argument presented by Sir John Simon for the appellants in this case. That argument although developed, and properly so, at considerable length, can really be condensed into a very few sentences. His propositions were these :—

(1.) A man has the right to trade as he pleases. Sorrell could therefore go to Watson for his supplies if he wished instead of to Ritchie.

(2.) The right of a man to trade as he pleases implies a correlative obligation on all others to let him trade as he pleases.

(3.) If others interfere, that is prima facie a wrongful act and can be restrained by legal process.

(4.) A prima facie unlawful act may be justified.

(5.) Mere anxiety to promote their own interests is not sufficient justification for those who so interfere.

But Sir John was answered by Mr. Clauson with an argument just as clear as his, which was directed to breaking down the third of the propositions, and in that, I think, he was successful.

(1) 23 Q. B. D. 613 et seq. (2) 6 Q. B. D. 333. (3) [1898] A. C. 1.

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In an opinion already, I fear, far too long, I must not multiply citations; but the whole matter will be found discussed at length in Lord Herschell's opinion in *Allen* v. *Flood*. (1) That learned judge says: "It was contended that the defendant by the course he took had interfered with the plaintiffs in their trade or calling, and that this of itself was an actionable wrong." He then goes on to examine the well known decoy case and the other cases cited, which he holds do not bear out the proposition, and then discussing it on principle he says: "I do not doubt that everyone has a right to pursue his trade or employment without 'molestation' or 'obstruction' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or *justified*" (the italics are mine), "I say that such a proposition in my opinion has no solid foundation in reason to rest upon."

The truth is that the affirmant of the third proposition shuts his eyes to the fact that the act which interferes may be per se just as lawful an act as the act which is interfered with, and that is the way in which Lord Macnaghten expresses it in the same case. He says: "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

My Lords, I entirely agree with these two noble and learned Lords. A citation which may sound to be to the contrary was made from a judgment by Lord Parker in the Privy

(1) [1898] A. C. 132, 138, 151.

Council in the case of *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (1) No one respects more than I do the dicta of that very learned judge, but, expressed as it is, it is only a dictum. The case really depended on a question of statutory legislation. As the quotation stands in its full breadth, it is incompatible with the judgments I have just quoted, and so long as the present practice of the Judicial Committee prevails, it is obvious that not only can the authority of the other noble and learned Lords who heard the case not be invoked—for it is possible that any one of them might, if left to himself, have tendered different advice to His Majesty—but still less can a dictum which is sought to be applied with far reaching effect be supported as the considered opinion of the other members of the Tribunal.

My Lords, this brings me at last in sight of the actual facts in this case. For the reasons stated I think Sir John Simon's third proposition breaks down, and with it that way of stating the argument. But the question of conspiracy still remains. The means were not illegal; all the means used were to tell Watson that if he did not cease supplying Sorrell, the newspaper proprietors would cease to supply him. To cease to supply Watson was just as legal in itself as Sorrell's leaving Ritchie, because he did not carry out the distance resolution.

What I have to do is to fancy myself a juryman, faced with the question with which I began this opinion, and which, I think, still remains: Was there here a conspiracy to injure Sorrell? I hold there was not. I entirely agree with the way that the learned judges of the Court of Appeal have looked at the facts. Sorrell had volunteered to take action as a piece of policy on behalf of the federation. The action of the circulation managers was a defensive action to protect their own trade against being dictated to by the federation; it was, in no sense, a conspiracy to injure Sorrell, and here I again repeat my apology for my hypercriticism. I agree so thoroughly with what the learned judges of the Court of Appeal said; only I look at the inquiry into the facts, not as

(1) [1913] A. C. 781.

H. L. (E.) 1925 SORRELL v. SMITH. Lord Dunedin.

a means of arriving at the conclusion whether there was justification of what, without justification, would be an illegal action, but as evidence of whether there was any proof of illegal action, i.e., a conspiracy to injure, and I find, as a juryman, that there was none. As I am attempting to deal with the whole subject, I should say something as to the meaning of the expression "threats," which, as I have noticed above, Lord Halsbury in some of his remarks in *Quinn* v. *Leathem* (1) considered as in that case equivalent to a tortious act. The matter is discussed at some length by Scrutton and Atkin L.JJ. in *Ware and De Freville* (2), and with their views I generally agree. Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established.

I must also add one word as to the citation of Scrutton L.J. of Bowen L.J.'s words as to a varying standard. I have no fault to find with them as they were used in the *Mogul* case (3), where, there being no illegal means and no conspiracy made out, it was attempted to fix a further standard of what was "reasonable" or "legitimate" to do. But these words must not be pressed too far. When you ask a jury or a judge whether there was a conspiracy to injure or only a set of acts dictated by business interests, you necessarily come in contact with the view that is held by that jury or judge.

Take a very simple case, a running down case by driving in a thoroughfare. However much a jury may have explained to them what is meant by negligence, yet it will always remain that one set of men might return a different verdict from another set of men on the same facts. And this leads me to my last remark. I do not know whether I have truly responded to the invitation of the learned judges in the Courts below, to say something clear. I may have failed,

(1) [1901] A. C. 495. (2) [1921] 3 K. B. 40.
(3) 23 Q. B. D. 616.

but even if I have succeeded, there will still be cases that arise where an application of the law, be it ever so clearly set out, is attended with great difficulty, when the facts are so evenly balanced that it will be possible to fall on one side of the stile or of the other. But in this case I do not personally think that they are difficult; I find no illegal means, I find no conspiracy to injure, and, therefore, I think the judgment is right.

I hope it is unnecessary to add that in my long review of authority I have entirely put on one side the law as applied to disputes between employers and workmen and between trades unions and others, the law on such questions being regulated, to a great extent, by special statutory provisions.

LORD SUMNER. My Lords, Russell J.'s statement of the facts, as reported at [1923] 2 Ch. pp. 50–52, deserves very careful study. Put shortly, but not, I hope, so as to do him any injustice, his view was that the defendants were well meaning busybodies, who intimidated third parties and so meddled with the plaintiff's business in a matter which was no business of theirs. That he was right in acquitting them of malice, that is of malevolence, there can be no doubt. There was no evidence of it. The defendants did not even know Mr. Sorrell. For the rest, I think it is clear that they were minding their masters' business and that there was neither threat used nor intimidation brought about. They were employed to look after the circulation of the papers they represented, and they thought, as well they might, that (in general) the more people try to sell papers the better for the papers. They found the plaintiff's association endeavouring to enforce its "distance limit policy" with the idea that (in general) the fewer shops try to sell papers the better for the shopkeepers. In this conflict of opinion, upon a matter on which I have none, they thought that, in particular cases where the question of enforcing the "distance limit policy" arises, it is better in the interests of their papers that they themselves should decide them. The learned judge fancied that the circulation managers had no objection to the association's policy, but claimed to direct it or at least to exercise

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a veto over it themselves. He seems to have understood the one witness, who was called by the defence, to have meant that his committee proposed to interfere for the protection of any wholesale distributor, who was being victimised in the cause of the distance limit policy, and that in so doing they heard only one side and condemned the other without a hearing, conduct which he took to be inconsistent with anything but fussy and unjustifiable meddling. I am sure that the defendants had no thought of such quixotry. Their purposes were commercial and not judicial. As a matter of business they meant to be the friends of their friends and, so far as they could, to be masters of the situation for the benefit of their papers. The learned judge did not actually disbelieve the witness, but he depreciated and in effect misunderstood him. Some witnesses for the plaintiff had said, that they thought the wholesalers' association, rather than the circulation managers, were the parties concerned, but surely, if the latter came to the aid of the former, that would not be inconsistent with both being directly interested. It is impossible to read the circulars and manifestoes of the association, which were put in evidence and ought to be examined, without seeing that any campaign, carried on in the enterprising spirit and for the self-regarding purposes which they disclose, was well calculated and tolerably certain to provoke just the kind of opposition, which is the subject matter of the present action. The plaintiff's "distance limit policy" may imperil the defendants' interests unless they can control it, and if, in doing so, they interfere with his trade, they are none the less safeguarding their own trade, a thing which is legitimate, unless done by illegitimate methods. Were, then, the methods wrong?

The "threats" employed by the defendants were made to Mrs. Noyes, trading as Watson & Co., and to Messrs. W. H. Smith & Son. Mrs. Noyes gave her own account of them. She did not say, nor was she invited to say, that she felt intimidated or that she thought she was menaced in any way, and being asked "Will you tell his Lordship in your own words why you gave the notice or any notice to Mr. Sorrell?" she tranquilly replied "Because I thought it

was better to lose one customer than to lose my supply and ruin my business." I have no doubt she would have preferred to supply Mr. Sorrell and as many more customers as she could, but she knew that in business she could not have everything, and was content to act for the best in each case.

As for the other "intimidated" party, I think the idea of intimidating Messrs. W. H. Smith & Son is rather whimsical. Their representative, who was examined, does not suggest it, and indeed the firm seem to have lent their aid to persuade Mrs. Noyes to see reason, which Mrs. Noyes for her part was by no means loath to do. Throughout the transaction both these third parties saw that their interest did not lie on the plaintiff's side and acted accordingly. However inevitable this conclusion might be, it was strictly a case of free choice.

If, then, the facts, truly understood, are that the defendants acted for the purpose of furthering their employers' interests in a matter of trade rivalry and did so without menaces or intimidation and without malice, it appears to me that the decision in the *Mogul Steamship Co.'s* case (1) covers them, and is sufficient in itself to justify the dismissal of this appeal. In so thinking, I gather that I am in accord with the prevailing opinion of your Lordships.

The reasons to the contrary suggested by the appellant I understand to be these. (1.) The finding that there was no malice is immaterial. The defendants acted with the intention of getting their own way. If they got it, the appellant would necessarily be interfered with in his business to his loss. This being the natural consequence of their action, they must be deemed to have intended to injure him, which was a legal wrong. (2.) Every man has at common law a right to carry on his business as he chooses—in this case to buy his newspapers from any one who is willing to sell them—and it is an actionable wrong to interfere with his doing so, either with the actual intention of injuring him, which would be malicious, or by means of threats and coercion, which are illegal means, or in combination with another person or persons, which is an illegal manner. For my part I cannot see how these

(1) [1892] A. C. 25.

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propositions, even if made out, distinguish this case on the present facts from the case of the *S.S. Mogul*. (1)

For the second proposition *Quinn* v. *Leathem* (2) is said to be a clear authority. As to that case, I gather that your Lordships' opinions are not entirely at one. For this reason, and also out of respect for the appellant's learned and copious argument, I venture to offer some observations of my own. I shall not attempt to collect or compare quotations from the opinions delivered in that and other cases. They are occasionally expressed in varying terms. In this matter I have not found myself qualified to offer an eirenicon or even an anthology.

In the first place all these cases of conflict between trade organizations or trade interests involve, that the actor seeks to secure for himself some advantage, which otherwise might accrue to his rival, and intends to get it if he can, which involves the intention of preventing his rival from keeping it or from getting it, so far as may be. Hence in every one of them it must be possible to contend that the action is taken maliciously, in the sense of imputed or inferential malice suggested by the appellant. Such a contention is inconsistent with the rule now firmly established in the *Mogul Steamship* case. (1) All well planned and successful commercial action of this kind must prejudicially affect the rival and is intended to do so. If these factors in themselves involve legal malice and so involve legal liability, the *Mogul* rule would only protect against liability for prejudice inadvertently caused, for, if the defendants' policy misses its mark altogether, the plaintiff has no prejudice to sue for. Further, action thus taken is almost always, if not necessarily so, combined action. There is no more combination in the present case than there was in the *Mogul Steamship* case (1), and there is equally little coercion or threat. In both cases the defendants made known what they meant to do, which in both was something to thwart or disappoint or interfere with the plaintiff and to oblige a third party to choose, whether he would be on the plaintiff's side or on the defendants'. In both, there was a complete

(1) [1892] A. C. 25. (2) [1901] A. C. 495.

absence of menace, unless simply announcing your intention be a menace, which it can only be as a figure of speech, and in both the third party reacted not under coercion but in the intelligent pursuit of his own interests as he saw them. Except for the proposition, that the respondents must be deemed to have intended to injure the appellant, which I venture to call fallacious, I do not think that any attempt was made on behalf of the appellant to distinguish the present case from that of the *Mogul Steamship Co.* (1) In effect your Lordships were asked to treat *Quinn* v. *Leathem* (2) as conflicting with that decision. Thus you would be free to select the better doctrine of the two, which was said to be that of the latter case.

My Lords, I am unable to see the suggested inconsistency. As I understand *Quinn* v. *Leathem* (2), Quinn and his friends were in fact guilty of malevolence and spite in their action, and so they truly acted with malice. Of this there was evidence. I doubt if the case could have been decided, as it was decided, without this feature. I am clear that the decision cannot be read as treating this feature as immaterial. This House unanimously decided that, as there was evidence on which the jury, properly directed, could find as they did, their verdict must stand. Many reasons for this were given, and many observations were made, some perhaps not necessary to the decision at all, but there is not such unanimity among these individual reasons as can be said to extend the decision of the House beyond what I have stated. If that is so, the decision does not rule the present case, in which there was clearly no malice at all.

My Lords, in *Quinn's* case (2) the proof of malice was this. The workmen, acting together and in accord with their spokesman, told Leathem that his men, including his foreman, must join their union. He assented and offered to pay the subscriptions himself, which would have to be paid for the purpose. His offer was refused with the remark, that the men ought to walk the streets in idleness for a long term before being admitted. Violence of words or conduct may

(1) [1892] A. C. 25. (2) [1901] A. C. 495.

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always be evidence of malice. The sincerity of this savage sentiment towards the men was, however, belied by the action actually taken. The workmen induced Leathem's foreman not only to quit him, but to do so without notice in breach of his contract, and then, so far from condemning him to walk the streets, they admitted him to their union forthwith and paid him money for his support ad interim. This was some evidence, that the statements which the workmen made as to their object, were mere professions. Their real object was to punish Leathem for his conduct in harbouring non-unionists and was not simply to advance their own interests in the future by bringing those non-unionists into their fold. Their purpose was to dominate his will in the conduct of his business, and was malicious. At any rate, if the jury so held, they could do so on this evidence. That the words used by the trial judge—"wrongly and maliciously"—meant and were all along understood to mean two things—namely, "without right and with malevolence," and not one thing only—namely, "so as to be actionable"—is, I think, clear from what was said throughout the case, from the summing up of FitzGibbon L.J. down to the last, or certainly to the last but one, of the opinions delivered in your Lordships' House. Throughout the case the words "combination" and "conspiracy" are used interchangeably, which would not have been done, if actual malice was immaterial, without some warning that "conspiracy" was not being used as connoting the guilty mind which is involved in the indictable offence. Some noble and learned Lords dwell on the evidence of actual evil feelings; some adopt the judgments of Andrews J. and of Holmes L.J., which so dealt with the facts. Not one says: "Why waste time in discussing malice? Why even use the word? It only means 'so as to give a cause of action,' and that depends on the use of threats or on the coercive effect of combined action." Either of these features, perhaps, and certainly both together, would give a cause of action, even though the workmen had been as polite and as passionless as Messrs. Macgregor, Gow & Co. and their associates were in the China Conference of 1885.

It ought to be observed that in *Quinn's* case (1), apart from the *Lumley* v. *Gye* (2) point, what caused the actual injury to Leathem was the loss of Munce's custom and the workmen's malice was directed towards Leathem and not towards Munce. I am not prepared to limit the terms "threats" and "intimidation" in this connection to threats of violence, but it certainly would be going beyond the recent current of judicial opinion to say that there is an actionable menace, whenever workmen intimate to an employer that his employees will withdraw their labour, unless he takes the course which they desire that he should take. This was, however, all the pressure that was applied to Munce. No violent or vindictive language was used to him. He was not induced or constrained to break any contract. If it could be taken that on the facts Munce really was intimidated, or frightened so as to be deprived of his freedom, the case would be much simplified, but do the facts amount to this? The report of the evidence does not so state nor do the jury so find. In my opinion the present is not a case, in which it is necessary to affirm or deny the right of workmen in their own interests to call on an employer to choose between the alternatives which they present to him, and I certainly cannot for myself see that *Quinn's* case, at any rate, decides that they have not such a right. The injuria is to be found in the workmen's general damnifying conduct, maliciously pursued, and their action upon Munce was merely that part of their conduct which produced the actual damnum to Leathem. Hence it was their malice that made them liable. Just as defamatory words uttered on a privileged occasion cease to be words which the speaker is entitled to utter if he is actuated by express malice, so the pursuit of one's own interests at a rival's expense, which pure commercial selfishness would justify, passes the limit of legal right and enters the field of actionable wrongdoing, if for that purity there is substituted independent malevolence towards others.

Disputes as to the meaning and place of the words "malice" and "maliciously" in the law of tort are now old and

(1) [1901] A. C. 495. (2) 2 E. & B. 216.

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have not been wholly settled. Perhaps they never will be. Between ethics and law on these subjects no sharp line has yet been drawn. Between the man, who exercises his legal rights with hatred in his heart, and the man who means well but fails to keep his action on the windy side of the law, there is a large field not altogether covered by legal decisions. Upon the view that "malice," as connoting personal enmity or spite or some other evil motive, plays no material part in the decision in *Quinn* v. *Leathem* (1), and is neither an essential element in the tort now in suit nor conclusive of the question whether it has or has not been committed, I wish, with all possible respect, to make this submission. It is a view, which involves the further proposition, that a combination, wilfully and without just cause, to injure a man in his trade, is in principle the essence of the wrong. "Wilfully" must here connote a determination of the actor's choice. It is more than saying, that the actors so did the act, that it became their act. It is more than saying that, whatever (if anything in particular) they in fact may or may not have intended, the law will hold that their intention was to produce the results naturally flowing from their acts. If this legal or imputed malice is put aside, the proposition must refer to some actual mental operation of choice, isolated from passion, independent of feeling towards others, an operation purely self-regarding and self-contained, voluntary and not under duress, conscious and not inadvertent, deliberate, as it is sometimes called, and not automatic or impulsive. So understood, I think the proposition is somewhat tautologous, for everything that the word "wilfully" can thus cover is already implied in action taken in furtherance of selfish business interests. These business manœuvres may be shortsighted or not; their effects may be fully apprehended or not; their victims may be specially aimed at or merged in a crowd, but I do not suppose that the question of the existence or non-existence of just cause is affected one way or the other by the mental ability of the actors, so that the stupid and shortsighted, who injure without knowing

(1) [1901] A. C. 495.

on whom their blow will fall, will escape, while those, who have the ability to aim at their mark and to hit it, will for that reason be held liable. Now if "wilfulness" is really tautologous, the question comes simply to be, how and by how far and under what conditions is the *Mogul Steamship* case (1) an exception out of *Quinn* v. *Leathem* (2)? and the answer, as I think, is essentially a matter of motive. Where the plaintiff has been injured in his business by the aggressive enterprise or the business competition of the defendants, there will be "just cause," exonerating the actors, if their motive has been coldly selfish, but if they really acted from some other motive they will be liable. How, then, can actual malice be excluded from the category of other motives, or indeed what other motive can there be in such a matter, beyond selfishness and malice, except, indeed, mere irresponsible wantonness? If motive generally is the test, what if the motives for the action are mixed? "Wilfulness" will in any case afford no answer. The decision must depend on the principle of the *Mogul* rule. Again, if the actors are exonerated by the character of their motive, purpose or object, the question is one of their state of mind, a question of fact only, and there will be no room for inquiring, whether their scheme was reasonable or whether their view of their interests was intelligent. They themselves will be the judges, for their mental state will determine the judgment. Apart from overt illegalities, the selfishness of their end will justify their actions and their means. Such a conclusion, to my mind, presents greater difficulties than I can resolve on this occasion. After all, it is enough to conclude that the absence of actual malice in this case takes it out of the decision in *Quinn* v. *Leathem*. (2)

As to the part which combination or concerted action plays in an alleged tort of this kind I think that this is not the occasion for expressing any decided opinion. One view is that the civil right of action for damage by conspiracy is the counterpart of criminal responsibility for conspiracy as a crime. Thus, according to Holmes L.J. in *Leathem* v.

(1) [1892] A. C. 25.

(2) [1901] A. C. 495.

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Craig (1), it is the offence against the public that stamps on an act done in furtherance of a conspiracy an actionable character at the suit of the individual damnified. Another opinion is that acts done in combination may be actionable, because they are more difficult to resist than acts done severally and without combination. The person against whom they are directed may give way to two opponents, when he would have treated one with indifference. I think a good many questions arise here. Whether these opinions point to the existence of two separate species of tort—namely, acts, which are the outcome of conspiracy, and acts, which are merely done in combination—or to only one species, at any rate they do not touch combinations as mere aggravation of damages, or refer merely to such combinations as would make joint tortfeasors of persons, who might at the plaintiff's option be sued severally for the same conduct. If conspiracy be relied on in the strict sense, plainly there are differences between conspiracy as an element in tort and conspiracy as a crime. In the latter at any rate mens rea is necessary. The grounds for resting *Quinn* v. *Leathem* (2) on conspiracy are also grounds for saying that actual malice was essential to that decision, whatever the precise proof of malice may be deemed to have been in that case.

Combination as constituting a separate species of tort, without any further feature, certainly presents difficulties. Does action, which would be wholly legal if done by a sole trader, become unlawful, if taken by him after giving a trivial share in his business to a junior partner ? Surely the *Mogul* rule, whatever it exactly is, protects a combination of defendants equally with an individual. Furthermore, if in accordance with the second view this kind of tort really depends on the difference between standing up to one person and giving way to two, it seems to be only a special illustration of torts arising from intimidation. I do not understand the proposition to be that acts, which are not actionable when done by one person must necessarily be actionable when done by two, but only that they may be so. Now in

(1) [1899] 2 I. R. 667, 775. (2) [1901] A. C. 495.

modern trade it is perfectly possible that the whole of a particular business in a given locality may be divided between one predominant trader and a number of very minor persons. The latter, singly and collectively, tremble at the former's nod, while he, from native obstinacy or the magnitude of his resources, regards even their collective action with contempt. What if the latter class, greatly daring, all combine to advance their interests at the expense of the single trader, and, strange to say, succeed? Is their conduct actionable at his suit, because they combined, though he was completely unmoved by their combination? It seems clear that he, acting alone, could take any ordinary competitive course, however incapable the others might be of resisting him? Is not there a good deal to be said for thinking that combination in such a connection is really only a particular form of intimidation, and that, where no one is or ought to be frightened, the combined traders are not tortfeasors, unless they would also have been tortfeasors, if they had acted simultaneously, but spontaneously, in identical ways but without concert or combination. Whatever part combination may really play in the decision of *Quinn* v. *Leathem* (1), I hesitate to say that this element alone would have sustained the verdict in the absence of evidence of actual illwill.

For practical purposes I think it is more important to draw the line between conduct, which the *Mogul Steamship Co.'s* case (2) will protect, and conduct which lies outside that case, and the more difficult this task is the more necessary does it seem to me to wait till concrete cases arise for decision before venturing upon any positive opinion. I do not at present accept the *Mogul Steamship Co.'s* case (2) as limited to those engaged in the struggle of competitive trade; nor am I prepared to say that it affords no defence to persons, who combine with the object of protecting or promoting their own business or interest and so take action directed against a person outside their combination, which results in damage to him. I incline to agree that the object or purpose of the aggressive action of a combination is the principal thing

(1) [1901] A. C. 495. (2) [1892] A. C. 25.

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to be considered, but both object and purpose are words standing in need of strict definition, and the tests, by which the definition is to be applied, seem to me not to have been as yet sufficiently examined. It is said that trade competition is not actionable, provided (inter alia) that the competitors are acting "solely" with the object of advancing their trade interests: Professor Dicey, Law Quarterly Review, vol. lxix., pp. 1–5. If this means that a member of a competitive combination, otherwise justifiable, is liable to find his share in the competition "illegal," if it is proved that he adds to his desire to make money a personal animosity against the rival, against whom he acts, and a personal glee in seeing him overtaken by defeat, I am not prepared to say that this proposition is yet established. How any definite line is to be drawn between acts, whose real purpose is to advance the defendants' interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other. I trust that what has been said on this occasion will not be taken as conclusive of these questions should they ever arise.

Furthermore, *Conway* v. *Wade* (1) treats as unsettled the question, whether an action will lie for inducing one person not to serve another, but without violence or threat or breach of contract. I think the present case does not afford an opportunity for settling this. There are also conflicting opinions on the question, whether in these cases a plaintiff has to show that the defendants' action was not within the *Mogul* rule or whether, on proof of an interference with his business, he shifts to the defendants the burden of excusing their action by praying that rule in aid. I refrain from expressing any decided opinion about this. If the plaintiff's right to pursue his business is not absolute, like the right to enjoy his own freehold, but is one to be enjoyed

(1) [1909] A. C. 506, 510.

alongside of the similar rights of the defendants, as is certainly the case, I think further consideration, on proved facts which raise the issue, is required before deciding whether the plaintiff's case may not be incomplete, till he has shown that the defendants were doing something more than push their own business within the limits (whatever they may be) allowed by law.

My Lords, I should accordingly be content to dismiss this appeal on the ground that the case is covered by the *Mogul* case without expressing any decided opinion on any further question. No "guidance" is more misleading, no "kindly light" is more of a will-o'-the-wisp than an obiter dictum sometimes contrives to be, a consideration which the cases cited in the course of this discussion have only too plentifully illustrated.

LORD BUCKMASTER (read by LORD DUNEDIN). My Lords, the appellants rest their contention upon the decision of this House in the case of *Quinn* v. *Leathem*. (1) They assert this authority to have determined that concerted action to interfere by threats, coercion or intimidation with a man's liberty to trade constitutes an actionable wrong and that this doctrine cannot be qualified by consideration of the purpose of the acts done.

It is obvious that the phrase "threats, coercion or intimidation" must in any circumstances be explained before this claim can be adequately examined. So far as it relates to acts unlawful in themselves the proposition is self evident; it is only when the meaning includes action that would or might be lawful that the question becomes intricate. The facts of the present case afford an excellent illustration of this distinction.

For the defendants to withhold supply of their newspapers from Watson or Messrs. W. H. Smith is in itself a perfectly lawful act, but the appellants say that when the threat of this exclusion is used to prevent Watson or W. H. Smith supplying newspapers to the plaintiff, it becomes, if done in

(1) [1901] A. C. 495.

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combination, an illegal act, and *Quinn* v. *Leathem* (1) has so decided. *Quinn* v. *Leathem* (1) is a case of great importance and its authority cannot be impeached, but, as Lord Halsbury said (2): "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

Now *Quinn* v. *Leathem* (1) established the following propositions: (1.) That the case of *Lumley* v. *Gye* (3) was correctly decided; (2.) that the case of *Allen* v. *Flood* (4) depended upon the fact that the defendant there acted alone and neither uttered nor carried into effect any threat at all; and (3.) that acts done in pursuance of a conspiracy having for its real purpose the injury of a man in his trade or calling are an actionable wrong. The last of these three propositions is the most important for the present purpose; it did undoubtedly decide that—did it decide more?

For the purpose of examining that question it is essential to see how the case came before the House.

The jury had held that the defendants had "wrongfully and maliciously" induced customers or servants of the plaintiff to cease dealing with him, and this finding followed a careful summing up, in which it was pointed out that by "wrongfully" was meant not only with intent to injure the plaintiff, but also not in furtherance of any trade dispute. Lord Halsbury says that he regarded the charge to the jury as "absolutely accurate." (5) And though he uses that phrase in connection with an argument relating to the questions actually put, yet with the whole summing up before him I cannot but think his words were intended to have a wider significance.

Lord Shand (6) refers to this particular passage with obvious approval, and Lord Brampton quotes it in detail

(1) [1901] A. C. 495.
(2) [1901] A. C. 506.
(3) 2 E. & B. 216.
(4) [1898] A. C. 1.
(5) [1901] A. C. 508.
(6) [1901] A. C. 512.

without any suggestion that it is wrong, and yet, if the appellant's argument be sound, it was useless or misleading. To my mind it was the essence of the case, and in spite of some general observations of wider import, it was the judgment upon the verdict given with that meaning attached that this House decided to support. In other words, the expanded finding of the jury was this. The acts done have for their purpose the plaintiff's injury as distinguished from acts done for advancing the defendants' own interests, and were, therefore, wrongful and malicious.

This view is summarized by Lord Halsbury in these words (1)—that all the acts done were done "with malice in order to injure the plaintiff," and upon this statement his judgment rests. Lord Macnaghten (2) says the question is, "Does a conspiracy to injure, resulting in damage, give rise to civil liability?" and though this might include an injury done in furtherance of legal and ulterior purposes, the case he quotes in support of the view that it does: *Gregory* v. *Duke of Brunswick* (3), is a case of designed and deliberate injury to an individual. Lord Shand's judgment proceeds throughout upon this view, and is summed up in these words (4): "Their acts" (i.e., the defendants') "were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade."

I regard Lord Brampton as holding the same view. (5) Lord Lindley (6) does indeed say: "That they" (the defendants) "acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour . . . . but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence."

This view is in its expression hypothetical and could not be regarded as an assumption of fact, except in disregard of

(1) [1901] A. C. 506.
(2) [1901] A. C. 510.
(3) 6 Man. & G. 205.
(4) [1901] A. C. 515.
(5) [1901] A. C. 530.
(6) [1901] A. C. 536.

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the jury's verdict, which was expressly approved. As an exposition of the law which must be followed, *Quinn* v. *Leathem* (1) decided no more than I have stated. It still remains to see whether, apart from this authority, the defendants are entitled to succeed. For this purpose it is essential to state exactly what I regard them as having done. They have threatened to withhold supplies of their papers from Watson and any firm who supplies Watson, if Watson continues to supply Sorrell, the reason being that Sorrell, at the invitation of the National Federation of Retail Newsagents, Booksellers and Stationers, has withdrawn his custom from Ritchie to Watson, because Ritchie has supplied and intends to continue supplying certain newsvendors whom the Federation believed to be in excess of the fair trade requirements of a particular area. The Federation think the best interests of the retail trade are secured by limiting in each area the number of retail dealers. The defendants regard their interests as best promoted by unrestricted competition. Of the merits of this controversy we are not called upon to judge. It is sufficient to say that it is a perfectly open trade quarrel and does not appear to be envenomed on one side or the other by spite or malice. In other words, the defendants, in order, as they believe, to advance their sales, combine in refusing to supply Watson, who, they think, is assisting in a course detrimental to their interests, and have informed Watson that they will take this step unless he ceases to supply papers to the plaintiff.

So stated I cannot see how this case differs in principle from the *Mogul Steamship* case (2) or the *Glasgow Fleshers* case (3), a case which was certainly not disapproved in *Quinn* v. *Leathem*. (1) Just as in the *Mogul* case the defendants were held entitled so to arrange their freights and agencies as to shut out competing traders, and in the *Glasgow Fleshers* case (3) the attempt was made to shut out the co-operative societies from the only market where United States and Canadian cattle could be sold, so here the defendants seek to

(1) [1901] A. C. 495. (2) [1892] A. C. 25.
(3) 35 S. L. R. 645.

arrange their distribution so as to prevent a limitation on the channels through which their wares circulate to the public.

I think, therefore, that as the law stands the defendants have done no wrong.

Having regard to the careful investigation of the authorities made by the noble Lords who have preceded me, I will not subject them to re-examination, but as the appellant has relied on the statement of Lord Loreburn in *Conway* v. *Wade* (1), that if an inducement to act in a certain way be "accompanied by violence or threats" there is a good ground of action, I think it right to say that I regard that statement as meaning "threats" either of violence or some other unlawful action. Threats to do or abstain from doing a perfectly lawful act cannot, as I regard the law, be wrongful. I also desire to state that in my opinion the case of *Ware and De Freville* v. *Motor Trade Association* (2) was rightly decided, and the judgment of Atkin L.J. may be accepted as a clear and authoritative statement of the law, and his comment on the case of *Conway* v. *Wade* (1) is a sufficient explanation of that authority. A threat to do an act which is lawful cannot, in my opinion, create a cause of action, whether the act threatened is to be done by many or by one. I am not, however, satisfied with the view expressed by Bankes L.J. (3) that in such cases as the present the question "is not so much whether the plaintiffs have made out a prima facie case as whether the defendants have justified their action." This doctrine is again enunciated by the learned judge in the present case in these words (4): "Mr. Justice Russell has held that the plaintiff had established as a matter of law that the defendants had committed an actionable wrong; and I understand him to have held that on a view of the law which rendered it unnecessary to consider whether the defendants had established that there was any lawful excuse for what they had done. I am not sure that I am accurate in that; but that is how I read his judgment. As this case is going

(1) [1909] A. C. 506, 510.
(2) [1921] 3 K. B. 40.
(3) [1921] 3 K. B. 61.
(4) Note.—This passage is taken from the Appendix.

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to the House of Lords, I say nothing about the law, because I have already expressed my view upon it; but as this is a question for the defendants, if it was necessary for them, and the onus was upon them, to establish what Lord Justice Bowen called 'just cause or excuse,' it is necessary, I think, that this Court should express its opinion upon that particular matter." And Warrington L.J. takes the same view. These opinions are expressly attributable to the statement of Bowen L.J. in the *Mogul* case, where he says (1): "Then comes the question: Was it"—that is the act complained of —"done with or without 'just cause or excuse'? If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable."

This appears to depend upon the view that a combination deliberately interfering with a man's trade was illegal per se, but could be justified if the purpose of the interference was to promote the trade interest of the combination. Personally, I should prefer in reaching the same goal to tread another path and to say that a combination having such a purpose was not illegal without malice, and that the onus is not on the defendant to justify but on the plaintiff to prove that the act was spiteful and malicious.

It is true that an act lawfully done by one may be illegal when two or more combine for its execution, but it does not follow that all acts done in combination which inflict injury on third parties are unlawful, even though that injury is the means contemplated to achieve the purpose of the combination.

Nor because an act done by an individual if lawful cannot become unlawful when done for the express purpose of injury, does it result that the same rule applies to acts done in combination, for the actual combination to injure lies at the root of the illegality. In the *Glasgow Fleshers* case (2) and in *Ware and De Freville* (3) the acts were, in my opinion, prima facie lawful, but they would have been unlawful had the

(1) 23 Q. B. D. 618. (2) 35 S. L. R. 645.
(3) [1921] 3 K. B. 40.

purpose of the combination been the deliberate injury of a third person and not the promotion of legitimate trade interests. This view has been fully expressed by Lord Dunedin, whose opinion I have had the opportunity of reading. His careful exposition of the law I accept, and to it I have nothing to add. Each case must depend upon its special facts; it is sufficient to say that in this case the act complained of was not illegal and the action must fail.

I desire to add that if your Lordships had taken a different view it would have been necessary that the competence of the plaintiff to maintain these proceedings should have been closely investigated. His action in withdrawing custom from Ritchie was to induce Ritchie to cease supplying another trader; it would have needed argument to show that in these circumstances he was entitled to equitable relief. No argument was in fact forthcoming. The appellant said the point had not been previously raised, and the respondents ignored it. This could not, however, close the eyes of this House to the importance of the fact, for no combination of two or more persons can exclude from the cognizance of a Court of equity facts and circumstances relevant to the exercise of its jurisdiction.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 15, 1925.

Solicitors for the appellant: *Shaen, Roscoe, Massey & Co.*
Solicitors for the respondents: *Lewis & Lewis.*

[PRIVY COUNCIL.]

J. C.*
1925
Feb. 26.

ATTORNEY-GENERAL FOR ONTARIO . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Legislative Power of Province—Appointment of Judges—Judicature Act, 1924 (14 *Geo.* 5, *c.* 30)—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 96.

The Judicature Act, 1924, of Ontario, s. 2, sub-ss. 2 to 6, and s. 4, sub-ss. 1 and 2, are ultra vires of the Legislature of the Province, since their effect is to authorize the Lieutenant-Governor of the Province to assign (that is to say to appoint) certain judges of the High Court Division of the Supreme Court to be judges of the Appellate Division of that Court, also to designate (that is to say to appoint) certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division, and consequently the provisions are inconsistent with s. 96 of the British North America Act, 1867, under which the powers of appointment referred to are given to the Governor-General of Canada.

Sect. 4, sub-s. 3, however, which provided that upon a vacancy occurring among the judges of the Appellate Division or of the High Court Division before the provisions of the Act came fully into force, the said Divisions were to consist of the remaining judges, was not open to objection.

Judgment of the Appellate Division (56 Ont. L. R. 1) affirmed subject to a modification.

APPEAL (No. 91 of 1924) from a judgment of the Supreme Court of Ontario, First Appellate Division (June 14, 1924), on a question referred to that Court by the Administrator of the Government of Ontario under the Constitutional Questions Act (R. S. Ont., 1914, c. 85).

The question referred was whether the Judicature Act, 1924 (14 Geo. 5, c. 30), was within the authority of the Provincial Legislature.

The effect of the material provisions of that Act, and of

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW, and LORD PHILLIMORE.

the British North America Act, 1867, appear from the judgment of the Judicial Committee.

The Appellate Division, consisting of Mulock C.J.O. and Magee, Hodgins, Masten and Smith JJ.A., gave its opinion as follows: "The form of the question does not invite the opinion of the Court as to whether some of said provisions are valid and others invalid, and as s. 9 provides for bringing the whole Act (with the exception of s. 4 previously provided for) into effect by Proclamation, it would seem to be necessary to deal with the Act as a whole in answering the question, which is, therefore, answered in the negative. The Court is of opinion (Hodgins J. dissenting) that sub-s. 2, sub-ss. 3, 4, 5 and 6 of s. 2, and sub-ss. 1, 2 and 3 of s. 4, are not within the legislative authority of the Legislature of the Province of Ontario."

The judgment of the Appellate Division is reported at 56 Ont. L. R. 1.

1924. Feb. 24. *Tilley K.C.* and *McGregor Young K.C.* for the appellant.

Clauson K.C., *Rowell K.C.* and *H. Stuart Moore* for the respondent.

[Reference was made to *Scott* v. *Attorney-General for Canada* (1); *Attorney-General for Canada* v. *Attorney General for Ontario* (2); *Piel Ke-ark-an* v. *The Queen* (3); *In re County Courts of British Columbia.* (4)

Feb. 26. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. Their Lordships do not see their way to differing from the decision of the Appellate Division in this case.

The question to be determined in these proceedings is whether the Judicature Act passed by the Legislature of Ontario in the year 1924 was within the powers of the Legislature; and for the purpose of deciding that question it is necessary to refer to certain provisions of the British

(1) Oct. 18, 1922, unreported. P. C. Appeal No. 76 of 1922.
(2) [1898] A. C. 247, 254.
(3) (1891) 2 B. C. Rep. 53.
(4) (1892) 21 Can. S. C. R. 446.

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North America Act, 1867. Sect. 92 of that Act entrusts to the Provincial Legislature the duty of making laws in respect of, among other things, the administration of justice in the Province, including the constitution, maintenance and organization of the Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts. Sect. 96 of the same Act provides that the Governor-General shall appoint the judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick. Sect. 99 provides that the judges of the Superior Courts shall hold office during good behaviour, and shall be removable by the Governor-General on addresses from the Senate and House of Commons; and under s. 100, the salaries, allowances and pensions of the judges are to be fixed and approved by the Parliament of Canada.

By the Judicature Act, 1924, which is the statute to be considered on this appeal, the Legislature of Ontario (putting it shortly) purported to establish in lieu of the existing Supreme Court of the Province a Supreme Court of Ontario, which was to consist of nineteen judges to be appointed as provided by the Act of 1867. Under the statute the position of the existing judges of the Supreme Court was to be safeguarded, but subject to that provision the judges were to be assigned, some of them to the Appellate Division of the Supreme Court, and the remainder to the High Court Division of the same Court; and under s. 2, sub-s. 5, of the Act the judges were to be so assigned to those two Divisions by the Lieutenant-Governor in Council. Under the same sub-section one of the judges of the Appellate Division was to be designated by the Lieutenant-Governor in Council to be the President of the Appellate Division, and was to be called the Chief Justice of Ontario; and under sub-s. 6 of the same section, one of the judges of the High Court Division was to be designated by the Lieutenant-Governor in Council to be President of that Division, and was to be called the Chief Justice of the High Court Division. Similar provisions are contained in s. 4, sub-ss. 1 and 2, of the Act.

What is the effect of those provisions? It can hardly be doubted that the result of them is to authorize the Lieutenant-Governor of the Province to assign—that is to say, to appoint—certain judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint—certain judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the statute, as it appears to be, there can be no doubt that the effect of the statute, if valid, would be to transfer the right to appoint the two Chief Justices and the judges of Appeal from the Governor-General of Canada to the Lieutenant-Governor of Ontario in Council; and if so, it must follow that the statute is to that extent inconsistent with s. 96 of the Act of 1867 and beyond the power of the Legislature of Ontario. This conclusion applies not only to sub-ss. 5 and 6 of s. 2, but also to sub-ss. 2, 3 and 4 of the same section, all of which have reference to the void provisions of sub-ss. 5 and 6 as well as to sub-ss. 1 and 2 of s. 4. Accordingly their Lordships agree with the Appellate Division in holding that sub-ss. 2 to 6 inclusive of s. 1, and sub-ss. 1 and 2 of s. 4 of the Act are invalid; but it does not appear to them that any objection can be taken to sub-s. 3 of s. 4.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed, and the order of the Appellate Division confirmed, except so far as it declares sub-s. 3 of s. 4 to be invalid. Their Lordships understand there is no question as to costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 June 18.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

GREAT SOUTHERN AND WESTERN RAILWAY COMPANY OF IRELAND } RESPONDENTS.

Crown—Contract with Government—Work in Connection with Transport in Southern Ireland—Functions and Liabilities of Minister of Transport—Transfer to Irish Free State—Effect on Contract—Petition of Right—Irish Free State (Agreement) Act, 1922 (12 *Geo.* 5, *c.* 4), *s.* 1, *sub-s.* 2, *Schedule*, *s.* 1—*Provisional Government (Transfer of Functions) Order*, 1922.

By agreements made in 1917 and 1918 between the President of the Board of Trade and a railway company in Southern Ireland it was agreed that in consideration of the company taking up the rails and sleepers on portions of their line, and transferring them to the Government for the purpose of constructing certain colliery railways to provide coal for local use during the war, the Government would, after the determination of the war, pay to the company the cost of replacing the rails and sleepers with new ones and of reconstructing their railway line. The company duly transferred to the Government the rails and sleepers and the railways were made. By the Ministry of Transport Act, 1919, and an Order in Council made under that Act the liabilities incurred by the Board of Trade under the said agreements were transferred to the Minister of Transport.

By an agreement for a treaty between Great Britain and Ireland, which by the Irish Free State (Agreement) Act, 1922, was given the force of law, the Irish Free State was created and a Provisional Government was established for twelve months.

By the Provisional Government (Transfer of Functions) Order, 1922, made in pursuance of this Act, after a recital showing that there had been set up, among other departments of the Provisional Government, a Ministry of Economic Affairs, to which was assigned the administration of services in connection with (inter alia) transport, including functions hitherto performed by the Minister of Transport and the Board of Trade, the functions in connection with the administration of public services in Southern Ireland theretofore performed by existing Government departments were transferred to the corresponding departments of the Provisional Government, and any property, rights and liabilities solely connected with the functions transferred under this order were transferred to the Provisional Government.

By the Irish Free State Constitution Act, 1922, s. 80, as respects

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD PHILLIMORE, and LORD CARSON.

departmental property, rights and liabilities, the Government of the Irish Free State were to be regarded as the successors of the Provisional Government.

Upon a petition of right the company claimed a declaration that, notwithstanding the above statutes and orders, the liability of the British Government under the agreements was still subsisting, and payment of the cost of replacement:—

Held, upon the construction of the Irish Free State (Agreement) Act, 1922, and the Provisional Government (Transfer of Functions) Order, 1922, that this liability had been transferred to the Provisional Government, and that consequently it was now vested in the Government of the Irish Free State.

Order of the Court of Appeal [1924] 2 K. B. 450 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J. (2) upon a petition of right.

The following statement is taken from the opinion of the Lord Chancellor:—

"My Lords, this appeal raises the question whether a liability undertaken by the British Government before the formation of the Irish Free State has or has not been transferred by the Irish Free State (Agreement) Act, 1922, and an Order in Council made under that Act to the Government of the Irish Free State.

In the month of March, 1917, the Board of Trade, acting under the Defence of the Realm Regulations, desired to construct a branch line connecting the respondents' railway at Athy with certain collieries at Wolfhill, their object being to make the coal from those collieries immediately available for the neighbouring population and so to save the shipping tonnage which would otherwise be required for bringing coal from Great Britain to Ireland. For that purpose the respondents consented to provide the necessary rails and some sleepers by taking up a length of rail where their railway had double lines, and substituting a single line; and it was agreed that after the determination of the Government control of Irish railways the British Government would pay the cost of replacing with new rails and sleepers the respondents' line of railway so taken up. In the month of September, 1918, the Board of Trade desired for the like reason to construct

(1) [1924] 2 K. B. 450. (2) [1924] 1 K. B. 154.

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a branch line connecting the respondents' railway at Dunmore with the Castlecomer Colliery; and it was agreed that the respondents should provide the rails and sleepers necessary for that purpose by taking up one of their lines between Athy and Kildare upon similar conditions; that is to say, upon the condition that the rails and sleepers so taken up should be replaced with new materials at Government expense, the company in this case making an allowance for betterment. The two agreements so made were partly oral and partly in writing, but so far as they were oral they were afterwards put in writing. The respondents duly provided the rails and sleepers, the value of which was paid to them by the Government, and the branch lines were made.

By the Ministry of Transport Act, 1919, the powers and duties of the Board of Trade in relation to railways were transferred to the Minister of Transport; and by s. 2, sub-s. 2, of that Act it was provided that His Majesty in Council might by Order make such incidental, consequential and supplemental provisions as might be necessary or expedient for the purpose of giving full effect to any transfer of powers or duties by or under the Act, including provisions for the transfer of any property, rights and liabilities held, enjoyed, or incurred by any Government department in connection with any powers or duties transferred. By the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920, it was ordered as follows:—

'As from the 3rd day of December, 1920, all the property, rights and liabilities held, enjoyed or incurred by the Board of Trade in connection with the Athy-Wolfhill Colliery Railway and the Castlecomer Colliery Railway shall be transferred to and vested in the Minister of Transport, and such rights and liabilities shall be exercisable by or enforceable against the Minister of Transport in like manner as they would have been by or against the Board of Trade if this Order had not been made.

In the construction and for the purposes of any Act of Parliament, judgment, decree, order, award, deed, contract, regulation, by-law, or other document passed or made before

the date hereof in relation to the Athy-Wolfhill Colliery Railway and the Castlecomer Colliery Railway the name of the Minister of Transport shall be substituted for the name of the Board of Trade.'

By the Articles of Agreement for a Treaty between Great Britain and Ireland, dated December 6, 1921, it was agreed (among other things) as follows :—

'1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

. . . . . .

17. By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such Provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.'

By the Irish Free State (Agreement) Act, 1922, it was enacted as follows :—

'1.—(1.) The Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Schedule to this Act shall have the force of law as from the date of the passing of this Act.

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(2.) For the purpose of giving effect to article 17 of the said Agreement, Orders in Council may be made transferring to the Provisional Government established under that Article the powers and machinery therein referred to. . . . . Any Order in Council under this section may contain such incidental, consequential, or supplemental provisions as may appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of this section.'

By the Provisional Government (Transfer of Functions) Order, 1922, which was made under the last mentioned Act, after a recital showing that there had been set up, among other departments of the Provisional Government of the Irish Free State, a Ministry of Economic Affairs, to which had been assigned the administration of services in connection with trade and commerce, transport, electricity and shipping, including functions hitherto performed by the Minister of Transport and the Board of Trade, it was ordered (among other things) as follows :—

'1. The functions in connection with the administration of public services in Southern Ireland heretofore performed by existing Government departments and officers, shall, as from the day of transfer, be transferred to and become exercisable by the departments and officers of the Provisional Government to which the functions are severally so assigned as aforesaid but without prejudice to the power of the Provisional Government to redistribute those functions amongst its departments and officers as it thinks proper.

6.—(iii.) Nothing in this Order shall affect the administration of any service before the day of transfer, or the manner in which, or the fund out of which, the cost of the administration of that service before the day of transfer is to be provided.

12. Any property, assets, rights and liabilities connected with the functions transferred under this Order shall, if connected solely with those functions, be transferred to the Provisional Government, and if connected partly with those functions and partly with other functions shall be

apportioned in such manner as may be agreed between the Governments concerned.

13.—(vi.) In the construction and for the purposes of any deed or contract made before the transfer of functions to a department or officer of the Provisional Government from any existing Government department or officer under this Order, but so far only as may be necessary for the purpose of such transfer, the name of the department or officer of the Provisional Government shall, as from the day of transfer, be substituted for the name of the existing Government department or officer, and where anything has been commenced by or under the authority of any existing Government department or officer before the day of transfer and such thing is in relation to functions transferred to a department or officer of the Provisional Government under this Order, such thing may, after the day of transfer, be carried on and completed by or under the authority of the department or officer of the Provisional Government.'

The Constitution of the Irish Free State, which was confirmed by the Irish Free State Constitution Act, 1922, included the following article :—

'80. As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Eireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Eireann), as the successors of such department of the British Government.'

By the Adaptation of Enactments Act, 1922, passed by the Parliament of the Irish Free State, after reciting (among other things) that it was desirable to make provision for the continuance of pending Government contracts, it was enacted (by s. 15) as follows :—

'15.—(1.) Every deed and every contract and agreement in writing made before the 6th day of December, 1922, with or by any person by or with any Minister, Department or Authority of the late British Government in Ireland or the

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late Provisional Government of Ireland, or by or with any official of either of those Governments acting on behalf of such Government, shall if and so far as the terms and provisions of such deed, contract or agreement were not fully executed and completed on the 6th day of December, 1922, be construed and read as if the name of the Minister, Department, Authority or Official exercising in Saorstát Eireann functions the same as or corresponding to the functions exercised at the date of such deed, contract or agreement in respect of the area now comprised in Saorstát Eireann by the Minister, Department, Authority, or Official named in such deed, contract or agreement was substituted in such deed, contract, or agreement for the name of the Minister, Department, Authority or Official actually named therein.

(2.) The benefits conferred and the obligations imposed by any such deed, contract or agreement as is mentioned in the preceding sub-section of this section on the Minister, Department, Authority or Official named therein shall, so far as the same on the 6th day of December, 1922, remained to be performed, be as from that day respectively vested in or imposed on the Minister, Department, Authority or Official whose name is by the preceding sub-section of this section substituted in such deed, contract or agreement for the name of the Minister, Department, Authority or Official actually named therein as fully as if such substituted Minister, Department, Authority or Official were actually named in such deed, contract or agreement.'

The respondents now propose to replace the lines of railway taken up under the abovementioned agreements of March, 1917, and September, 1918; and a question has arisen whether the cost of such replacement when effected (estimated by the respondents at 44,763*l.*) will be repayable to the respondents by the British Government, or whether, as the result of the series of Acts and Orders above set forth, this liability has been transferred to the Government of the Irish Free State. The respondents presented a petition of right alleging that the Board of Trade, or their successors the Ministry of Transport, remained liable under the agreements, and claiming a

declaration to that effect and payment of the amount in dispute; and the petition was duly indorsed with His Majesty's fiat. Rowlatt J., by whom the petition was heard, held that the liability had been transferred to the Irish Free State, and dismissed the petition; but this decision was reversed by the Court of Appeal, who made an order that judgment should be entered in favour of the suppliants for a declaration that if and when the suppliants should have reconstructed so much of their railway as was disturbed for the purpose of supplying materials for the construction of the colliery railways in the petition mentioned they would be entitled to be paid the sum expended by them in such reconstruction, subject in the case of the Castlecomer Railway to an allowance for betterment to be agreed between the suppliants and the Crown, or failing agreement to be determined by a railway engineer agreed upon by both parties. Against this order the Crown has appealed to your Lordships' House."

1925. May 4, 5. *Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* (with them *Giveen*) for the appellant. The contracts have created what are described in the relevant Acts of Parliament as liabilities of the Board of Trade. By the Ministry of Transport Act, 1919, and the Ministry of Transport (Athy-Wolfhill and Castlecomer Colliery Railways Transfer of Property) Order, 1920, made under the authority of that Act the liabilities of the Board of Trade in connection with these railways were transferred to the Minister of Transport, and the contracts in relation to these railways were to be construed as though the name of the Minister of Transport had been substituted for the name of the Board of Trade. By the Irish Free State (Agreement) Act, 1922, and the Provisional Government (Transfer of Functions) Order, 1922, made thereunder the liability of the Ministry of Transport was transferred to the department of the Provisional Government of the Irish Free State known as the Ministry of Economic Affairs. Finally, by the Irish Free State Constitution, art. 80, as regards departmental liabilities the Irish Free

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State are made the successors of the Provisional Government. The result of this Imperial legislation is that the Irish Minister of Economic Affairs has been substituted for the Minister of Transport as regards the liability to pay the respondents under these contracts. The Imperial Parliament has itself transferred this liability first to the Provisional Government and then to the Irish Free State. The transfer from one executive to another of the whole powers and machinery of Government involves a transfer of the departmental rights and liabilities connected with the functions transferred by the Order of 1922. Then is this particular liability connected with the functions transferred? It is submitted that it is. The liability was incurred in the exercise of powers vested in the Board of Trade (or the Minister of Transport as their successor), which were clearly transferred to the Ministry of Economic Affairs. It cannot be assumed that the Imperial Government is to pay for laying these rails, the laying of which it is for the Ministry of Economic Affairs to supervise. The intention and effect of the Constitution was that as from the date when the Irish Free State began to function that State became the body which had to discharge the liabilities of the Imperial Government so far as they related to the Irish Free State. Assuming that the Crown is wrong as to the effect of the Imperial legislation the Irish Government has effected the same thing by the Adaptation of Enactments Act, 1922. That statute operates to take away, so far as Irish citizens are concerned, any right against the British Government in respect of these contracts to the extent to which their terms are not already executed and to substitute the liability of the Irish Government.

[They also referred to the Petitions of Right Act, 1860, ss. 9, 13, 14, and *Churchward* v. *The Queen*. (1)]

Sir John Simon K.C. and *J. A. Hawke K.C.* (with them *J. F. Eales*) for the respondents. It is not established that the Provisional Government (Transfer of Functions) Order, 1922, has transferred to the Irish Executive any function to which this liability attaches. This is not a liability connected

(1) (1865) L. R. 1 Q. B. 173.

with the functions transferred by the Order. The contract is simply that the Government will pay for the replacement of the rails. There is no clear discharge of liability by the Government which has made the contract and no clear assumption of liability by the Irish Government. There is a transfer of powers and machinery and a transfer of certain administrative functions, but is the effect of cl. 12 of the Order to say that the promise to pay is no longer binding on the Government that made it ? The function transferred is the administration of the railway department of the Board of Trade or the Minister of Transport so far as South Ireland is concerned, but how is that connected with this liability ? If that is the effect of cl. 12 it goes beyond the Act which authorized the making of the Order, and is ultra vires. Then as to the Irish legislation : it cannot bar a subject of the Crown here from making his application for relief. As to the petition of right, it is not an objection in limine to a petition which has been filed that this is a liability proper to be discharged out of some Dominion fund : *Williams* v. *Howarth* (1) ; Keith's Responsible Government in the Dominions, vol. i., p. 143.

[They also referred to *Marshal Shipping Co.* v. *Board of Trade.* (2)]

Sir Douglas Hogg A.-G. replied.

The House took time for consideration.

1925. June 18. VISCOUNT CAVE L.C. [after stating the facts :] My Lords, the liability to pay the costs of replacement undertaken by the agreements of March, 1917, and September, 1918, was of course a liability of the British Crown, which on maturity would fall to be discharged out of moneys to be provided for that purpose by the Parliament of the United Kingdom. The nature and incidence of a debt so incurred has been authoritatively described in such cases as *Churchward* v. *The Queen* (3), and is not open to question.

(1) [1905] A. C. 551. (2) [1923] 2 K. B. 343.
(3) L. R. 1 Q. B. 173.

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This being so, the transfer by the Act of 1919 and the Order of 1920 of the powers and liabilities of the Board of Trade in relation to railways to the Minister of Transport is of little importance in this case. The contingent liability to pay for replacing the rails remained after that transfer a liability of the Crown, the only change being in the Minister entrusted with the duty of advising the Crown upon the matter.

But the question as to the effect of the agreement for a treaty between Great Britain and Ireland and the Act confirming that agreement, and of the Order in Council made under that Act, is of vital importance in this case. The effect of that agreement, and of the Act of Parliament which gave it the force of law, was to set up in Southern Ireland a new State or Dominion similar to that of Canada, with a Parliament having the power to make laws for the peace, order and good government of that State and the duty to provide funds for that purpose, and with an Executive responsible to that Parliament; and the real question is whether the liability which is in question in these proceedings, which was originally a liability to be discharged (if and when it matured) out of moneys to be provided by the Parliament of the United Kingdom, became by virtue of the agreement and confirming Act and of the Order in Council made under that Act a liability to be discharged out of moneys to be voted by the Parliament of the Irish Free State. This is the proposition which is asserted by the Attorney-General, representing the Government of the United Kingdom, and which is disputed by the respondents in their petition of right; and the question is which of those two conflicting views should be affirmed?

My Lords, in my opinion the Irish Free State (Agreement) Act, 1922, and the Provisional Government (Transfer of Functions) Order, 1922, did upon their true construction transfer the liability in question to the Government of the Irish Free State. It must be remembered that the liability was a future and contingent liability, undertaken by the Crown on the advice of the Board of Trade, and relating to an Irish railway. The Act of 1922, in confirming the establishment of the Irish Provisional Government, provided

that Orders in Council might be made for transferring to that Government the powers and machinery requisite for the discharge of its duties and that any such Order might contain such incidental, consequential or supplemental provisions as might appear to be necessary or proper for the purpose of giving effect to that transfer. Now it was manifestly impossible for the Provisional Government, and in particular for its Ministry of Economic Affairs, properly to discharge their duties without having transferred to them the functions of the British Ministry of Transport in relation to the railways in Southern Ireland; and it was (I think) a necessary and appropriate incident to that transfer that the property of the Crown connected with that administration and the liabilities of the Crown to arise in relation to that administration should in like manner be transferred. If that be so, then there can be no question as to the validity of arts. 1, 12 and 13 of the Transfer of Functions Order; and I cannot doubt that the effect of art. 12 and art. 13 (vi.) of the Order was to transfer to the Provisional Government, not only the property in the branch lines at Wolfhill and Castlecomer (as to which there is no question), but also the future and contingent liability of the Crown to pay for the replacement of the rails removed from the respondents' railway for use on those branch lines. And if this liability was transferred to the Provisional Government, then it is undoubtedly now vested under art. 80 of the Constitution in the Government of the Irish Free State as the successors of the Provisional Government and of those departments of the British Government whose functions had been transferred to the Provisional Government, and falls to be discharged out of moneys to be provided by the Parliament of the Free State.

That this conclusion is in accordance, not only with the terms of the several Acts and Orders, but with the reason of the case, is (I think) plain. The Free State Government now holds the branch lines to which the rails and sleepers were transferred. That Government alone can sanction the replacement of the lines removed from the respondents'

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railway and can regulate the method of replacement and control the expense incurred. The lines when replaced will be for the benefit of the surrounding population, and the betterment of the respondents' line (for which under the terms of the Castlecomer Agreement the respondents are to make an allowance) will proceed from that population. At the time when the Acts and Orders were passed, it was plain that the administration of all the railways in Southern Ireland would pass out of the jurisdiction and control of the British Ministry of Transport and would become a function of the Free State; and it was natural that the assets and future liabilities connected with that function should at the same time be transferred to the Government of that State. I think that on the true construction of the Acts and Orders this was their effect, and accordingly that this appeal should succeed.

No doubt it is unfortunate that the Government of the Irish Free State was not represented in these proceedings; and it has been suggested on behalf of the respondents, that, if your Lordships' decision should be adverse to them, they may have difficulty in recovering the sum in question from the Irish Free State. I venture to say that this is most improbable. The Adaptation of Enactments Act, 1922, which is an Act of the Parliament of the Irish Free State, contains a provision that every contract in writing made before December 6, 1922, with any Minister of the British Government shall be read as if the name of the Minister exercising in the Free State functions corresponding to those exercised at the date of the contract by the British Minister named therein were substituted in the contract for the name of the Minister actually named therein; and that the obligations imposed by any such contract on the British Minister named therein shall so far as unperformed be imposed on the substituted Minister of the Irish Free State. It is hardly possible to conceive words more appropriate for transferring the liability in question and for making it binding upon the Government of the Free State; and I do not doubt that the liability so imposed by the Parliament of the Irish

Free State, as well as by the Agreement for a Treaty, upon the Government of that State will be fully honoured.

For the above reasons I am of opinion that this appeal should be allowed, and that the order of the Court of Appeal should be set aside and the order of Rowlatt J. restored with costs here and below, and I move your Lordships accordingly.

VISCOUNT HALDANE (read by LORD DUNEDIN). My Lords, the question we have to decide is whether certain claims of the respondents which were before the creation of the Irish Free State claims falling to be discharged out of the Imperial revenue of Great Britain have or have not, by virtue of legislation, ceased to be so dischargeable, and have become claims to be discharged by the Irish Free State out of its own revenues.

The respondents own a railway situated entirely in Southern Ireland. In 1917 it was thought expedient by the Imperial Government that for the purpose of effecting the transport of coal from collieries known as the Wolfhill Collieries to Athy Junction, a light railway between these points should be constructed as part of a provision for war. On March 20, 1917, an informal agreement was made between the President of the Board of Trade and the respondents, by which, for the purpose of constructing the light railway, rails and sleepers forming part of a double line of the respondents between Athy and Carlow should be taken up, and, in consideration of this, the respondents should be paid the cost of alterations to be made by them necessitated by working the line as a single instead of a double one, and should also be paid the cost of replacing the line so taken up with new rails and sleepers. The rails and sleepers forming part of the old double line were in fact taken up and used for the construction of the light railway. By a subsequent agreement made in 1918 it was provided that for the purpose of transporting coal from another colliery, known as the Castlecomer Colliery, a second light railway should be made, and to effect this purpose the respondents agreed to the removal of part of their double line between Athy and Cherryville. The terms of this second agreement were substantially the same as those of the

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agreement of 1917, so far as payment was concerned. Under this agreement also part of the rails and sleepers were removed from the old double line. All sums due to the respondents in respect of the cost of the alterations of their old lines, necessitated by the line being worked as a single line, have been paid, and as to these costs no question now arises. It is common ground that the respondents are not yet entitled to payment for the work to be done in replacing the part of the line taken up with new rails and sleepers, as that work has not yet been done.

A petition of right was duly presented by the respondents under the Petitions of Right Act of 1860 for the payment of the amount to become due for this further work. By s. 14 of that Act the Treasury are required to pay the amount to which the suppliant is declared to be entitled out of any moneys in their hands for the time being legally applicable thereto or which may be voted by Parliament for that purpose, if the petition relates to any public matter.

Rowlatt J., before whom the petition was tried, held that the effect of the legislation which established the Irish Free State was to transfer to its Government all functions so far as exercisable in Southern Ireland of every British Government Department, and that the transfer had taken place. He considered that the liability to pay under the agreements had thus been transferred. For he thought that it must be borne in mind that this liability was not a mere money demand but one to mature hereafter under agreements still executory, and depended for its accrual and amount on the execution of works in Southern Ireland which the Government of Southern Ireland would have the right to supervise or modify or cancel. He consequently dismissed the petition.

The Court of Appeal took another view. They held that there remained nothing to be done by the British Government excepting, when the respondents fulfilled the conditions on which they were entitled to payment, to pay to the respondents the money due. As the respondents had no present right to payment, they therefore, reversing the judgment of Rowlatt J., made a declaration to the effect

that when the respondents had reconstructed so much of their railway as was disturbed for the purpose of supplying materials for the construction of the colliery railways mentioned they would be entitled to be paid the sum expended by them on such reconstruction, subject to an allowance which it had been agreed should be made for betterment. The ground on which the Court of Appeal proceeded was that the liability under the agreements had not been transferred when the change in the system of government was made. The real agreements, they considered, had been made not with any English department but with the Crown. The liability of the Crown under these agreements had not been transferred to the Ministry of Transport, when that Department was set up in 1919 to take over the liabilities of the Board of Trade, for the latter were as such under no individual liability. Nor was this position, in the view of the Court of Appeal, altered by the agreement which was by the statute of 1922 given the force of law and which set up a Government of Ireland with an executive subject to an Irish Parliament, possessing the status usual in a Dominion.

In the first instance it should be observed that a Provisional Government was to be set up in Southern Ireland and that, for the purpose of giving effect to art. 17 of the agreement, Orders in Council might be made transferring for a limited period to the Provisional Government the powers and machinery necessary for the discharge of its duties. An Order in Council was accordingly made at Windsor on April 1, 1922, by which under s. 1 the functions in connection with the administration of public services in Southern Ireland theretofore performed by existing Government departments and officers were transferred to and made exercisable by the departments and officers of the Provisional Government. By s. 6 (iii.) nothing was to affect the administration of any service before the day of transfer, or the manner in which or the fund out of which the cost of the administration of that service before the day of transfer was to be provided. By s. 12 any property, assets, rights and liabilities connected with the functions transferred under the Order were transferred to the Provisional Government.

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By s. 13 (vi.) the name of the department or officer of the Provisional Government was as from the day of transfer to be substituted for the name of the existing British department or officer for the purposes of any deed or contract. If anything had been commenced by or under the authority of any existing Government department or officer, and such thing was in relation to functions transferred, such thing might be carried on and completed by or under the authority of the department or officer of the Provisional Government. Under the schedule to this Order in Council the administration of services in connection with transport was transferred to the Irish Ministry of Economic Affairs.

On December 5, 1922, an Imperial statute established a permanent constitution for the Irish Free State. The status was to be that of a member of the community of nations forming the British Commonwealth of nations; in other words it was to be a Dominion status. All powers of Government, and all authority, legislative, executive and judicial, in Ireland, were to be derived from the people of Ireland and to be exercised in the Irish Free State through the organization established by or under and in accord with this constitution. The executive was to be in the King, advised by Irish ministers. As regarded departmental property, assets, rights and liabilities, the Government of the Irish Free State were to be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department became functions of the Government of the Irish Free State, as the successors of such department.

On December 5, 1922, there was also passed an Imperial statute which made provisions consequential on or incidental to the establishment of the Irish Free State. On the provisions of this statute nothing seems to me to turn for the purposes of the question before us.

The new Irish Legislature passed an Act on December 20, 1922. Under this Act it set up an Irish Central Fund which was to take the place completely of the Consolidated Fund. In s. 15, every deed and contract and agreement in writing made before December 6, 1922, if and so far as the terms and

provisions were not already fully executed by December 6 in that year, was, in respect of the area of the Irish Free State Government, to be read as if the name of the Minister, department, authority or official, exercising in the Free State functions the same as or corresponding to the functions exercised at the date of the deed, contract or agreement in respect of what had become the Free State area was substituted for the name of the Minister, department, authority or official actually named in the instrument.

My Lords, I think that the only relevance of this Irish statute to the present question is that it shows that a Government was set up in Ireland which took the place in a complete and far-reaching form which the Government of Great Britain had occupied.

The grounds of the judgment of the Court of Appeal were in substance that no contractual liability or right of a department or its officer that applied to the case before it was transferred; that there was no named party to the contract in question for whom an Irish department or officer was substituted; that the word "successors" was not by itself enough to transfer rights or liabilities; and that there were no clear words depriving the respondents of the benefit of the source to which they could originally look for compensation. They accordingly made a declaration of future liability against the British Government.

My Lords, the case of the respondents is that the Board of Trade and the Ministry of Transport under authority from the Crown established a contract between the Crown itself and the respondents which still subsists, the creation of the Irish Government notwithstanding. I will assume for the purposes of my observations that this was so. But what is the nature of the remedy on this footing made available against the Crown? The Court of Appeal appear to me to have proceeded on the footing that the remedy in case of its breach was analogous to that on the ordinary contract of a private individual. Surely s. 14 of the Petition of Right Act contains a warning that this is not to be assumed. Under that Act no personal judgment against the Sovereign can

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be rendered. All that the Act provides is, in a public matter, that the Treasury may be required to pay what has been found due out of any moneys in their hands legally applicable thereto, or which may be thereafter voted by Parliament for that purpose. This is not a provision which is to be expected otherwise than in the restricted form in which it is made. In the case of *Commercial Cable Co.* v. *Government of Newfoundland* (1) the Judicial Committee of the Privy Council had to consider a case in which the Governor of Newfoundland in Council had entered into a contract under the Great Seal of the Dominion to pay for a cable which had been laid and for work which had been done. There was a change of Ministry and the contract was repudiated. It was held that, in the absence of the approval of the House of Assembly, which ought to have been obtained, the contract was not a binding one. It was said that while the agreement was entered into with all due solemnities, so far as the Governor was concerned, he was subject to constitutional restrictions, and that, while he could by using clear language have bound himself personally, he could not be presumed to have contracted otherwise than officially and subject to these restrictions. Unless the Legislature approved the agreement, it was therefore not binding in the absence of the antecedent approval which the constitution of the Dominion required. For all grants of public money, either direct or prospective, must be in the discretion of the Legislature, and, where the system is that of responsible government, there is no contract unless that discretion has been exercised in some sufficient fashion.

In *Auckland Harbour Board* v. *The King* (2) the same tribunal laid down that it had for more than two centuries become a principle of the British Constitution that no money can be taken out of the Consolidated Fund excepting under a distinct authorization from Parliament itself, and a payment made by the executive Government, however clear the contract, without such an authorization, was held to be ultra vires and recoverable.

(1) [1916] 2 A. C. 610. (2) [1924] A. C. 318.

But perhaps the most remarkable authority on the question of the nature of the liability created by a contract purporting to be made by Ministers on behalf of the Crown is that of *Churchward* v. *The Queen*. (1) There the Lords Commissioners of the Admiralty, purporting to act for the Crown, contracted that if Churchward would establish a mail service between Dover and the Continent they would pay him for the service definite amounts out of moneys to be provided by Parliament. Churchward established the services. It was held that there was no implied contract on the part of the Admiralty to continue to employ him. Parliament had refused to supply the funds. It was held that Parliament not having supplied the funds for payment, no personal covenant by the Crown or the Admiralty could be implied that the contractor should be employed to carry the mails. As Shee J. says in concurring in the unanimous judgment of the Court of Queen's Bench, the condition of this supply by Parliament is one which, even if not expressed, must have been implied on account of the notorious inability of the Crown to contract unconditionally for money payments. The Admiralty, he considered, could not be taken to have contracted on any other footing but that of dependence on the vote of Parliament. Otherwise the Admiralty would get beyond the control of Parliament.

My Lords, I am of opinion that the judgments in these three cases illustrate a principle which is definitely recorded in our textbooks of constitutional law. However clear it may be that before the Revolution Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply. In the present case Parliament transferred the duty of producing the fund out of which the liability in question, when it accrued, should be met to the Irish Parliament. It thereby declared its intention not itself to provide the money required out of its own Consolidated Fund. It does not matter whether the liability was in terms transferred to the

(1) L. R. 1 Q. B. 173.

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Irish Government. By its very character it would cease when it became operative to be a liability of the British Consolidated Fund and become one of the Irish Legislature Central Fund, if they chose to so provide.

I think that this appeal ought, therefore, to succeed. It is important that we should lay down clearly the restricted nature of the liability in modern times of the Crown under its contracts. It seems to me that what I believe to be the true character of this liability makes beside the point the bulk of the reasoning in the judgments under appeal in this case. For the true view of any liability there was I take to be that it was a liability in rem which ceased to be operative when the res was transferred.

LORD DUNEDIN. My Lords, I concur. I need not re-read at length the sections which in this matter operate the chain of transference which links the Irish Free State with the Board of Trade, which made the original contract. Nor need I add anything to what has just been said by the noble Viscount as to the true intendment and effect of contracts or agreements made by a Government department in the name of the Government. The original agreement had the effect of transferring to the Board of Trade the property in the rails, chairs, etc., which were put at their disposal by the Great Southern and Western Railway Company of Ireland and subjecting the Board to a contingent liability. That liability and that property were clearly transferred to the Ministry of Transport by the Orders in Council authorized by the Ministry of Transport Act and dated September 22, 1919, and December 3, 1920. Then came the Irish Free State Agreement Act and its consequent Order in Council, by which the functions of existing Government departments were transferred to the indicated new departments.

"Function" is a perfectly general word, comprehending, as I think, all duties and liabilities connected with such duties, but any doubt as to the meaning of the word is, I think, set at rest by the twelfth section, which has been quoted and specially uses the word "liabilities." Lastly came the

Irish Free State Constitution Act and art. 80 of the Constitution repeated and confirmed by that Act.

The learned judges of the Court of Appeal found difficulty in thinking that there was a departmental liability. I cannot say such difficulty affects me. I do not know what a departmental liability is, except a liability on behalf of the Government and which is only enforceable as the noble Viscount has said. A Government department never binds itself personally, i.e., in the persons of the officers who compose it. I concur.

My Lords, I am authorized to say that my noble and learned friend Lord Carson concurs in the judgment of my noble and learned friend Viscount Haldane which I have read.

LORD PHILLIMORE. My Lords, I should have desired that those who have conducted this litigation had brought to our notice the actual instruments issued by the officers of the Government when they purported to act under reg. 2a made under the Defence of the Realm Act and take possession of the lands required for the Athy and Wolfhill Colliery Railway and the Castlecomer Colliery Railway and accepted from the Great Southern and Western Railway Company of Ireland the rails and sleepers then forming part of one of their older lines and employed the company to set down the rails and sleepers for the new colliery lines and make the necessary alterations at the junctions.

But these instruments have not been brought to our notice. Perhaps there were none. Perhaps the officers of the Government said nothing but merely acted. Your Lordships are apparently to assume that in some way or other under this reg. 2a that happened which is described as the Board of Trade taking possession of land and constructing and maintaining such works as might be necessary for the purpose of an emergency railway; and that at the same time His Majesty's Government on behalf of His Majesty through that department which is known as the Board of Trade gave an assurance or undertaking to the company that if the

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company put down new rails and sleepers and restored the old state of things at the junctions, the expense should be defrayed by the Government, i.e., out of public moneys.

But this leaves a very nebulous transaction. The Board of Trade which is supposed to have been the organ of Government through which this was done, is nothing but a committee composed of those eminent persons who for the time being hold certain high offices of State, who take no action individually or collectively, but in whose name certain Ministers such as the President of the Board and the Secretary purport to do certain acts. It is not a corporate body. No provision had been made by Parliament for its holding property or entering into contracts or incurring liabilities or suing or being sued, except that under the Merchant Shipping Act of 1894, s. 460, certain actions may be brought against a secretary in respect of acts done by the department. The only way then to get at substance behind these forms is to treat the so-called action of the Board of Trade as the act of the Crown acting through some Minister responsible to it and to Parliament.

Since this case was heard, I have made some research into the language used by Parliament when conferring certain powers upon the Ministers of the Crown, whether those powers were new creations or merely transfers from one department to another.

By the Act 5 & 6 Vict. c. 94, s. 5, all castles, forts and other lands which have been heretofore set apart for the use and service or placed under the charge of the Ordnance or late Barrack Department or other persons acting under the authority of or in trust for the Sovereign for the use and service of these departments or for military defences or held or purchased for the defence and security of the Realm (I have compressed the verbosity of the statute) are to be vested in the principal officers of His Majesty's Ordnance and their successors in office in trust for His Majesty for the service of the Ordnance Department or such other public service as His Majesty may by Order in Council direct. By s. 6 lands thereafter acquired shall be vested in the same manner. By

s. 11 upon the death, resignation or removal of any principal officers the lands subject to the Act shall be vested in the succeeding principal officers. By s. 34 suits may be brought in the name of "The Principal Officers of His Majesty's Ordnance"; but in such suits they are to have the rights, privileges and prerogatives of the Crown.

When after the experience of the Crimean War it was determined to raise the War Department to the rank of a separate Ministry and to entrust it to an additional Secretary of State, this was done by statute 18 & 19 Vict. c. 117.

By this Act, s. 1, all the powers, authorities, rights and privileges of the principal officers of Her Majesty's Ordnance were to be transferred to, vested in and exercisable by that Principal Secretary of State to whom Her Majesty should entrust the seals of the War Department; and by s. 2, all lands and property held by the principal officers were to be vested in the Secretary of State, and whenever he ceased to hold office were to be divested from him and vested in his successor in office.

By s. 3 all contracts made by the principal officers were to be transferred to him, and suits might be brought by him by his official title.

When the Local Government Board was created by the Act 34 & 35 Vict. c. 70, there was apparently no question of any Crown property, the control of which was to be transferred. But by the statute "powers and duties" "vested in or imposed on" the Poor Law Board or the Secretary of State were transferred to the new Board to be performed "subject to the same conditions, liabilities and incidents."

When quite recently the Ministry of Health was created by the statute 9 & 10 Geo. 5, c. 21, there were transferred to it all the "powers and duties" of the Local Government Board and some powers and duties belonging to several other Government departments, and power was taken to transfer other duties of other departments by Order in Council; and finally it was provided that His Majesty may by Order in Council make such incidental, consequential and supplemental provision for the purpose of giving full effect to any transfer

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of powers and duties "including provisions for the transfer of any property, rights and liabilities held, enjoyed or incurred by any Government department in connection with any powers or duties transferred."

I pause to notice that this statute contemplates the Local Government Board having acquired property, rights and liabilities which are to be transferred to the new Ministry. No similar words appear in the statute transferring the powers and duties of the Poor Law Board to the Local Government Board.

The Ministry of Transport Act of the same year, c. 50, creates the office and transfers to the Minister "all powers, and duties of any Government Department" in relation to railways, light railways and many other things.

Like the Ministry of Health Act, it enables His Majesty by Order in Council to transfer property, rights and liabilities held, enjoyed or incurred by any Government department in connection with any powers or duties transferred, and as in the case of that Ministry these provisions are described as incidental, consequential or supplemental and as being necessary or expedient for the purpose of giving the full effect to the powers and duties transferred.

After the passing of the Ministry of Transport Act the general position was that for railway purposes that Ministry took the place of the Board of Trade.

Specifically it was intended to substitute the Ministry of Transport for the Board of Trade in respect of these two railways; and by an Order in Council made December 3, 1920, it was recited that the powers and duties of the Board of Trade with regard to the two railways had been transferred but the property, rights and liabilities in connection therewith had not yet been so transferred, and it was provided that as from a certain date they should be so transferred.

This was the state of things when the Acts for establishing the Irish Free State were framed.

None of these Ministries—the Board of Trade, the Ministry of Health or the Ministry of Transport—appear to have been created corporations, nor has the device been adopted which

was adopted in the case of the Ministry of War of vesting the property in the individual who happens to be Minister and then divesting it in favour of his successor. But in the cases of the Ministry of Health and of the Ministry of Transport, Courts of justice must assume that in some way or other property is being validly held for the Crown and that with property follow rights, duties and liabilities.

Further, if your Lordships are to assume—and apparently both sides to this litigation invite you to assume—that the reg. 2a made under the Defence of the Realm Act was validly made, the same doctrine must be applied in respect of the Board of Trade.

So far then it is merely a departmental question whether a particular property is stated to be vested in one Minister or another. But when it becomes a question of a transfer from the Home Government to the Irish Free State or to any other Dominion, it is necessary to look into it somewhat more closely.

The property of the Crown in the Dominion is held for the purposes of that Dominion. Its benefits accrue to the Dominion Exchequer, and liabilities in connection with it must be discharged out of the same Exchequer. His Majesty has separate Attorney-Generals to sue and be sued in respect of each Dominion.

Burke in his great speech on economical reform complained of the cost of a litigation when "that pert, factious fellow the Duke of Lancaster, presumed to fly in the face of his liege lord, our gracious Sovereign, ... and presumed to go to law with the king."

But nowadays your Lordships may find in the Dominion of Canada, to which the Irish Free State is to be likened, an Attorney-General for Ontario suing an Attorney-General for Quebec, or both engaged in suing their superior officer, the Attorney-General for the Dominion; and it is possible that some day the latter may be found in litigation with the Attorney-General of the United Kingdom.

In these circumstances I am of opinion that no petition of right can be brought in the High Court of Justice of England

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which has for its object a judgment against the Crown which is to be satisfied out of the Exchequer of a Dominion, and that no judgment can be obtained on a petition of right so brought in respect of liabilities incident to the Ministry of a Dominion, because such liabilities are not to be satisfied out of the Exchequer of the United Kingdom.

We have then to consider whether this liability originally incurred by the Crown through the department of the Board of Trade of the United Kingdom has been transferred to the Government of the Free State.

It is here that I differ from the Lords Justices, and my difference is mainly on a question of construction.

I have come to the conclusion that the effect of the first Act 12 Geo. 5, c. 4, and the Order in Council of April 1, 1922, made under its powers, was to transfer the possession of this railway and the liabilities connected with it to the Irish Ministry of Economic Affairs in the Provisional Government, and that the second Act, 13 Geo. 5, c. 1, transferred these matters from the provisional to the existing Government.

Any question such as has been suggested whether the original transfer from the Board of Trade to the Ministry of Transport was ultra vires, becomes unimportant, because the Order in Council of April 1, 1922, operates a transfer from either or both Ministries to the Irish Ministry.

Any question whether this latter Order in Council was ultra vires, is set at rest by the statutory recognition contained in art. 80 of the Constitution of the Free State which is made a schedule to the second Act.

What, then, does the transfer in this Order in Council effect? The statute says that it should transfer "powers and machinery."

The Order speaks of transferring "functions in connection with the administration of public service heretofore performed by the existing Government departments and offices" and of "property, assets, rights and liabilities connected with the functions" as the matters to be transferred.

Under this Order the possession of these railways with all their incidents and advantages passed to the Irish Ministry.

Why not also the liabilities ? and why not that special liability, growing out of the advantage of the possession of the railways, to supply the place of the rails and sleepers taken for their use ? Bankes L.J. speaks of it as " an existing obligation." An obligation is a liability.

Warrington and Scrutton L.JJ. apparently hold that there was no liability to be transferred, because it could not properly be said that the Board of Trade was liable. But if it was not liable in the sense in which the word is used of departments of the Ministry, how does a petition of right come about ? The several departmental statutes which I have enumerated, speak of such matters as " liabilities." They are as between the Crown and a subject analogous to liabilities of subjects inter se, and it is plain what is intended by a transfer of them.

As to the distinction sought to be drawn between the liability of the Crown and the liability of a department, I agree with the noble and learned Lord, Lord Dunedin, that there is no such thing as a departmental liability as distinct from the liability or quasi-liability of the Crown.

It is suggested that the construction of these railways was not a matter in which Ireland was specially concerned. I fail to appreciate this point. Ireland was a part of the United Kingdom, and the United Kingdom was at war. If the railways had been in Essex, would it have been said that the Irish Exchequer should now, after the creation of the Free State, continue liable for some share of this liability ?

As it happens, however, I gathered that the main object of the construction of these railways was to provide coal for local use in the neighbouring parts of Ireland.

My Lords, I agree that this appeal should be allowed.

Order of the Court of Appeal reversed, and judgment of Rowlatt J. restored. The respondents to pay to the appellant the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the

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King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, June 18, 1925.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Peacock & Goddard, for E. White, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 *July* 17.

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

SENA SUGAR ESTATES, LIMITED . . RESPONDENTS.

Shipping—Freight Agreement—Construction—Breach—Agreement by Shippers to ship and by Owners to carry "all the sugar which the shippers shall have for shipment from B.," an East African port, to Europe—Shipment at another East African Port not available for Ocean Steamers on Lighters belonging to another Line for Transmission to B. and Transhipment at B. on Ocean Steamers of that Line for Europe—Through Bill of Lading.

The defendants, who owned sugar estates on the River Zambesi, were in the habit of sending sugar from one of their estates down the river in barges to the port of Chinde. It being impossible for ocean-going steamers to load at Chinde owing to a bar, the sugar was carried thence by lighters or coasting steamers to Beira, where it was loaded into ocean-going steamers for carriage to Europe, and bills of lading were issued from that port. By an agreement made between the defendants (therein called "the shippers") and the plaintiffs, a steamship company (therein called "the owners"), the shippers bound themselves to ship and the owners agreed to carry "all the sugar which the shippers shall have for shipment from Beira" to certain specified European ports for a year from the date of the agreement at a certain rate per ton, and the owners undertook to provide a minimum tonnage per month for the shipment, if required. During the currency of the agreement the defendants proceeded to send sugar from the said estate by a German line to European ports covered by the agreement. The sugar was sent from Chinde to Beira by lighters belonging to the German line, and it was then transhipped into the ocean-going steamers of that line

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

and through bills of lading were issued for the carriage of the sugar from Chinde to the European port.

In an action for breach of the agreement:—

Held, that this sugar was sugar which the defendants had for shipment from Beira within the meaning of the agreement, notwithstanding the issue of through bills of lading.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal varying an order of Bailhache J.

The facts are fully stated in the opinion of the Lord Chancellor and are summarized in the headnote. The appellants brought an action against the respondents in the King's Bench Division for damages for breach of a freightage agreement dated June 9, 1922, and made between the respondents (therein called "the shippers") and the appellants (therein called "the owners"), for themselves and the other British steamship lines which loaded at Beira (hereinafter called "the Conference Lines"), whereby the respondents bound themselves to ship and the appellants agreed to carry "all the sugar which the shippers shall have for shipment from" Beira to certain European ports therein specified from the date of the agreement to June 30, 1923, at the rate of 27*s.* 6*d.* per ton.

Bailhache J., upon the question of the construction of the agreement, made a declaration that sugar lightered or shipped from Chinde for transhipment at Beira was sugar which the defendants had for shipment from Beira within the meaning of the agreement, and he referred the question of damages to a special referee.

The Court of Appeal (Bankes, Atkin and Sargant L.JJ.) took a different view of the agreement and held that sugar entrusted at Chinde to a line other than one of the Conference Lines for shipment to European ports and shipped at Chinde by such other line whether in lighter or coasting steamer belonging to such other line under through bill of lading was not sugar which the defendants had for shipment from Beira within the meaning of the agreement of the 9th June, 1922, notwithstanding that the sugar might have been transhipped at Beira into the ocean steamer of such line.

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1925. June 18. *S. L. Porter K.C.* and *David Davies* for the appellants.

Langton K.C. and *Sir Robert Aske* for the respondents.

The House took time for consideration.

1925. July 17. VISCOUNT CAVE L.C. My Lords, this appeal relates to the construction of an agreement entered into in the month of June, 1922, between the respondents, the Sena Sugar Estates, Ld., and the appellants on behalf of the British steamship lines (known as the "Conference Lines"), which carry cargo from Beira to Europe; and in order to explain the meaning of the agreement it is necessary to have in mind the circumstances in which it was made.

The respondents are possessed of three sugar estates on the River Zambesi. From one of these estates (called Caia) the sugar is sent by rail to Beira, and there shipped by ocean-going steamers to Europe. The second estate (called Marromeu) is lower down the river and at a distance from the railway; and the respondents' practice has been to send the sugar from this estate in barges down the Zambesi to the small port of Chinde near the mouth of the river. Owing to a bar, no ocean-going steamer can load at Chinde, and accordingly the sugar was sent from that port by lighters or small coasting vessels to Beira, where it was transhipped into ocean-going steamers for carriage to Europe. The coasters used in this service were sometimes vessels belonging to the respondents, and sometimes vessels belonging to the Conference Lines or to other owners; but in every case the loading on ocean steamers took place at Beira, and a bill of lading was issued for the carriage of the sugar from that port to Europe. The sugar from the respondents' third estate (called Mopea) is not shipped to Europe, and it need not be further mentioned.

On April 19, 1921, an agreement was entered into between the respondents and the appellants on behalf of the Conference Lines by which the respondents (therein called "the shippers") bound themselves to ship and the

Conference Lines agreed to carry all the sugar which the shippers should have for shipment from Delagoa Bay or Beira to Europe during 1921 (except that quantity which the Portuguese Government insisted on having shipped by Portuguese steamers to Lisbon) at a certain rate therein mentioned. This agreement was faithfully carried out, but after it had expired—namely, in the month of April, 1922—the respondents entered into an agreement with a German line, the Deutsche Ost-Afrika Linie, whereby the respondents agreed to ship all their sugar from Chinde and/or Beira destined for Lisbon (with the exception of sugar which they were obliged to ship in Portuguese steamers) up to a certain tonnage by the vessels of the German line at the rate of 35*s.* per ton f.o.b. Chinde, and 26*s.* 6*d.* per ton f.o.b. Beira, both to Lisbon. This agreement became known to the appellants, and on June 9, 1922, the agreement was entered into which is the foundation of these proceedings. By that agreement the respondents (therein called "the shippers") bound themselves to ship and the Conference Lines (therein called "the owners") agreed to carry, force majeure excepted, "all the sugar which the shippers shall have for shipment from Beira to" certain European ports (not including Lisbon) from the date of the agreement to June 30, 1923, at the rate of 27*s.* 6*d.* per ton, and the owners undertook to provide tonnage for the shipment from Beira of a minimum quantity of 3000 tons per month if required to do so. Shortly after the conclusion of this agreement the respondents asked the appellants to quote a through rate for the carriage of sugar from Chinde to London, and on their declining to do so, proceeded to send sugar from the Marromeu estate by the German line, not only to Lisbon, but to some of the European ports covered by the agreement of June 9, 1922. This sugar was sent in precisely the same manner as the sugar formerly sent from Chinde for carriage by the Conference Lines—that is to say, it was loaded at Chinde on lighters which were towed to Beira, and the sugar was there transhipped into the ocean steamers of the German line; the only difference was that through bills of lading

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were issued by the German line for the carriage of the sugar from Chinde to the European port.

The appellants in vain objected to these shipments as being contrary to the agreement of June 9, 1922, and ultimately commenced this action against the respondents for damages for breach of that agreement. The action was heard by the late Bailhache J., who held that, having regard to the course of dealing which obtained when the agreement was entered into, shipments from Beira meant shipments which came down to Beira either by rail or river, and were there put on board ocean steamers, and that the issue by the German line of through bills of lading from Chinde did not prevent such shipments from being covered by the agreement. He accordingly made an order declaring (*a*) that sugar lightered or shipped from Chinde for transhipment at Beira was sugar which the defendants had for shipment from Beira within the meaning of the agreement of June 9, 1922, and (*b*) that shipments definitely intended for Lisbon and not elsewhere at the time of shipment were not within the agreement. The respondents having appealed to the Court of Appeal, that Court (consisting of Bankes, Atkin and Sargant L.JJ.) came to a different conclusion. They were of opinion that the expression "sugar which the shippers shall have for shipment from Beira" meant sugar which they should have for shipment by themselves from that port, and did not include sugar shipped from Chinde, although it was intended by all parties to be carried to Beira and there loaded on ocean steamers; and stress was laid on the fact that the German company issued through bills of lading from Chinde to the European ports. The Court accordingly allowed the appeal and substituted for the declaration made by Bailhache J. a declaration "That sugar entrusted at Chinde to a line other than one of the Conference Lines for shipment to European ports and shipped at Chinde by such other line whether in lighter or coasting steamer belonging to such other line under through bill of lading is not sugar which the defendants had for shipment from Beira within the meaning of the agreement of the 9th June, 1922,

notwithstanding that the sugar may have been transhipped at Beira into the ocean steamer of such line." It is against this order that the appellants have appealed to your Lordships' House.

My Lords, the only question to be determined is whether sugar which the respondents desired to have carried by lighters or coasters from Chinde to Beira, and thence by ocean steamers to any of the European ports mentioned in the agreement of June 9, 1922, was within the meaning of that agreement sugar which the shippers had for shipment from Beira; and having regard to the course of dealing which obtained before and at the date of the agreement, and which was well known to both parties, I think that such sugar fell within that description. It is true that, owing to the course adopted by the German line of issuing a through bill of lading from Chinde to Europe, the duty of effecting a transhipment of the sugar at Beira fell upon the servants of that line, and not upon the servants of the respondents; but nevertheless the sugar was intended both by the shippers and by the shipowners to be carried to Beira and there loaded on ocean steamers for Europe, or, in other words, it was sugar destined for shipment at Beira. If the German company had contracted to carry the sugar to Europe at two separate rates of freight, one from Chinde to Beira, and the other from Beira to the European port, the case would hardly have been arguable; and I do not think that the circumstance that a through rate was specified made any difference in the result. The form of contract was altered, but the course of transit remained the same. I am satisfied that both parties to the contract of June, 1922, intended that all sugar sent via Beira should be covered by the agreement, and it appears to me that they have expressed their meaning with reasonable clearness.

For these reasons, I am of opinion that the appeal should be allowed, and the order of Bailhache J. restored, with costs here and below, and I move your Lordships accordingly.

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LORD DUNEDIN. My Lords, the plaintiffs bind themselves not only to keep a line of steamers available for the transport of the respondents' sugar, but they bind themselves to provide accommodation for at least a certain number of tons. As a counterpart the respondents bind themselves to send by the plaintiffs' line "all the sugar which they shall have for shipment at Beira." Now I think the meaning of these words "sugar which they have for shipment at Beira" is not, as the learned judges of the Court of Appeal have held, sugar which at Beira is still under the control of the respondents for shipment to ship as they please, but is sugar which they can and do arrange shall be shipped at Beira. I think further that if they arrange with another company to take sugar on lighters or barges at Chinde and then tranship it at Beira on to ocean-going steamers, that is just arranging for shipment at Beira. The mere alteration from the old practice of having two bills of lading, one for the coasting service from Chinde to Beira and the other from Beira to Europe, to having one bill of lading covering the whole transit seems to me to be merely a change in the form of the contract of carriage, and not a change in the course of transit, as was thought by Sargant L.J., which view formed the foundation of his judgment. It would be quite different if there could be started a line of steamers going direct from Chinde to Europe. In the condition of the port at Chinde that is impossible, as, owing to the bar, ocean-going steamers cannot get into the port. But, as it is, I think the argument of the respondents is tantamount to holding that a transhipment is not a shipment.

I think the appeal succeeds.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the two judgments just delivered by my noble and learned friends, and I so thoroughly concur in them that I have nothing to add.

LORD SUMNER. My Lords, in the sentence, the true meaning of which is the question for decision on this appeal, the object

of the mutual stipulations to ship and to carry is sugar, and, grammatically, the dependent relative words "which the shippers shall have for shipment from Beira to the undermentioned ports" are descriptive of it. The shippers do not bind themselves to ship sugar at and from Beira, and it may be doubted if they themselves ever do ship anything at Beira. In the ordinary course they send their sugar by one route or another to Beira, there to be transhipped, probably by the carriers, into the ocean steamer. Accordingly the question is, "Can it be predicated of the sugar, at the time when the respondents had it in their hands but put it out of their power to give the appellants the benefit of conveying it by placing it in those of the German line under through bills of lading, that it was sugar which the respondents had for shipment from Beira to the named ports?" It seems to me that this can and must be so predicated of the sugar. As it could not be shipped at Chinde for Europe direct, a fact with reference to which the parties made their contract, but could only be shipped there for some port where ocean steamers can load, of which Beira was the most obvious if not the only one, the sugar was in the respondents' hands as sugar for shipment from Beira. The Court of Appeal thought that, as it was shipped from Chinde under through bills of lading given by agents of the German line, the sugar was in fact for shipment from Chinde, not from Beira. With all respect I cannot agree. The through bill of lading is a matter of the contractual machinery and not of the route. It does not constitute a quality of the cargo. The sugar was some of the respondents' via Beira sugar and was destined for Europe, and this equally, whether it was carried to Beira by rail or barge or coaster, whether under a separate contract or under through bills of lading. It is not as though the words had been "which the shippers shall ship from Beira," though even those words might not have made out the respondents' case. The words in question only identify the sugar, which the appellants are to have the right to carry. Accordingly I think the appeal should be allowed.

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VISCOUNT CAVE L.C. My Lords, my noble and learned friend Lord Buckmaster desires me to say that he concurs in the motion proposed.

Order of the Court of Appeal reversed, and order of Bailhache J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 17, 1925.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitors for the respondents: *Holman, Fenwick & Willan.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1925 — *July* 23.

GLASGOW IRON AND STEEL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

DICKSON . . . . . RESPONDENT.

COLTNESS IRON COMPANY, LIMITED . APPELLANTS;

AND

DALGLEISH . . . . . RESPONDENT.

Workmen's Compensation — Total Incapacity — War Addition — Repeal of Workmen's Compensation (War Addition) Acts, 1917 *and* 1919—*Saving Clause—Total Incapacity followed by partial Incapacity at Date of Repeal and subsequent Recurrence of total Incapacity—Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 1.

By s. 1 of the Workmen's Compensation Act, 1923, the Workmen's Compensation (War Addition) Acts, 1917 and 1919, were repealed as from December 31, 1923: "Provided that the addition provided for in the said Acts shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act, 1906, ... in respect of total incapacity arising from an accident which occurred on or before the said thirty-first day of December so long as the workman remains totally incapacitated. . . . ."

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD DARLING.

Before the repeal of the War Addition Acts a workman was totally incapacitated by an injury by accident arising out of and in the course of his employment. At the date of the repeal he was suffering from partial incapacity only, but shortly afterwards he again became totally incapacitated as the result of his injury:—

Held, that in assessing the compensation payable to him he was entitled under the proviso to s. 1 of the Act of 1923 to the war addition provided for by the repealed Acts.

APPEALS from interlocutors of the First Division of the Court of Session, affirming determinations of the Sheriff-substitute of Lanarkshire under the Workmen's Compensation Acts, 1906 to 1923.

The question to be determined was the same in each appeal —namely, as to the construction to be placed upon the proviso to s. 1 of the Workmen's Compensation Act, 1923.

In the first appeal the facts proved in the stated case were as follows: On September 14, 1922, the respondent sustained an injury by accident arising out of and in the course of his employment with the appellants at their Parkneuk Colliery, Motherwell, and was totally incapacitated thereby until November 18, 1923, when he became fit for certain very restricted kinds of light work, and his incapacity became partial only.

From November 18, 1923, till February 23, 1924, the respondent was employed by the appellants as temporary watchman, but he was then forced to give up the work owing to the return of the man whom he was replacing.

The respondent's average wage on September 14, 1922, was 2*l.* 8*s.* The appellants paid compensation to the respondent as for total incapacity from September 14, 1922, to November 18, 1923, and as for partial incapacity from November 18, 1923, to February 23, 1924, when they ceased payment. Thereupon the respondent instituted these proceedings for payment of compensation at the rate of 1*l.* per week as from February 23, 1924, together with the relative additions thereto, as provided in terms of the Workmen's Compensation (War Addition) Acts, 1917 and 1919, and the Workmen's Compensation Act, 1923. On the day of the proof the appellants offered the respondent employment

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at their picking tables at half the usual rate of wage—namely, at a weekly wage of 7*s.* 9*d.*

Upon these facts the Sheriff-substitute found in law that the respondent's earning capacity was at the date of the proof, and had been since February 23, 1924, so restricted that there was an onus upon the appellants to show him where he could obtain work suitable to his capacity; that the offer of work made to the respondent on the day of the proof was an illusory offer, which he was not bound to accept; and that the appellants had failed to discharge the onus which lay upon them, and were therefore liable to the respondent in compensation as for total incapacity. He therefore awarded compensation to the respondent at the rate of 20*s.* per week, with statutory war additions, from and after February 23, 1924.

The question of law for the opinion of the Court was whether he was right in holding that the provisions of the Workmen's Compensation (War Addition) Acts, 1917 and 1919, were applicable to the claim.

In the second appeal the facts were not materially different.

Morrice Mackay K.C. and *James R. Marshall* (both of the Scottish Bar) for the appellants in both appeals.

In construing the proviso to s. 1 of the Workmen's Compensation Act, 1923, regard should be had to the purpose for which the war additions provided for by the repealed Acts of 1917 and 1919 were granted. They were intended as a temporary addition to the normal scales of compensation in order to enable the totally incapacitated workman to meet the rise in the cost of living brought about by the war. The war addition was made payable only to a workman while totally incapacitated since the sum receivable each week by such a man remained constant. The repealed Acts were meant to expire shortly after the end of the war, and were extended from time to time by Expiring Laws Continuance Acts. It was not intended by the proviso to keep alive the repealed Acts in the case of a workman who was totally incapacitated by an old accident, unless he remained

totally incapacitated at the date of the repeal. By the proviso the addition provided for in the repealed Acts is to "continue to apply" to a weekly payment payable to a workman under the principal Act "in respect of total incapacity" arising from an old accident. But in the case of a workman partially disabled at the crucial date, December 31, 1923, there was no payment to which the addition provided for in the repealed Acts could "continue" to apply, as the payment was then in respect of partial not of total incapacity. Further, the proviso provides that the addition is to continue "so long as the workman remains totally incapacitated." The continuity once broken and the payment ceasing, there is no machinery for setting it going again should the workman relapse, say, a year or more after the repeal of the Acts. The proviso saves only such payments for total incapacity as were in existence at the date of the repeal. The Legislature did not intend to make the repealed Acts permanent Acts in the case of old accidents, but intended to alleviate possible hardship in individual cases. It intended to benefit a limited class of workmen—namely, those suffering from total incapacity at the time of the repeal. There are certain well known canons of construction which apply to this case. (1.) In construing an Act of Parliament the words of the Act must be read in their common and ordinary signification, and the language must not be strained so as to bring in or exclude particular cases because they seem hard, however arbitrary the line of demarcation drawn by the Act may appear to be: *Hoddinott* v. *Newton, Chambers & Co.* (1) Applying this principle, the words "so long as the workman remains totally incapacitated" should not be read as equivalent to "provided that the workman is totally incapacitated." (2.) An Act of Parliament must be construed according to its language without any a priori assumption as to the probable intention of the Legislature. (3.) Where an Act is capable of two possible constructions, that construction is to be preferred which gives a meaning to the whole of the words used, since the Legislature is

(1) [1901] A. C. 49, 57.

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not to be presumed to have used language to which no meaning whatever is to be attached. *East London Ry. Co.* v. *Whitechurch* (1) is an authority for both these principles. The construction adopted by the First Division gives no effect to the words "so long as the workman remains totally incapacitated." Upon that construction those words are superfluous and tautologous. Moreover, if that were the intention of the Legislature, it could have been effectuated much more simply by the repeal of the War Addition Acts, subject to a proviso that "the addition provided for in the said Acts shall continue to apply to any injury arising from an accident which occurred on or before the said 31st day of December, 1923."

Craigie M. Aitchison K.C. and *R. Gibson* (both of the Scottish Bar) for the respondent in the first appeal, and

Carmont K.C. and *W. A. Murray* (both of the Scottish Bar) for the respondent in the second appeal were not called upon.

LORD DUNEDIN. My Lords, in the first of these cases the respondent, who was a working man in the employment of the appellants, met with an accident, which was admitted to be in the course of and arising out of his employment, and was totally incapacitated from September 14, 1922, to November 18, 1923, during which time he was paid for total incapacity. On November 18, 1923, he became capable for partial work, and was in partial work for a certain time, but his total incapacity recurred on February 23, 1924, and is existent up to this time.

On his application to the Sheriff for compensation the Sheriff gave him the sum due for total incapacity under the principal Act of 1906, and as to that there is no controversy, but he also held that he was entitled under s. 1 of the Workmen's Compensation Act, 1923, to certain additions, and it is as to those additions that this appeal is raised. The First Division upheld the judgment of the Sheriff, and held that he was entitled to those additions.

(1) (1874) L. R. 7 H. L. 81, 86, 89.

The additions arise in this way. During the war in 1917 there was a Workmen's Compensation (War Addition) Act, which provided that: "Where any workman is at any time during the period for which this Act continues in force entitled during total incapacity to a weekly payment," then he gets one-fourth more than the amount provided under the principal Act. That Act as passed was only to continue during the war and a period of six months thereafter, but by means of Expiring Laws Continuance Acts it was continued until December 31, 1923. In the meantime that had been amended —and the amending Act was also continued to 1923—by the Workmen's Compensation (War Addition) Amendment Act, 1919, which changed the addition from one-fourth to three-fourths. In 1923 was passed an Act to amend the Workmen's Compensation Act, 1906. This Act was passed on November 16, 1923, and, as I have already said, the position of the War Addition Acts was that if nothing was done they would have become extinct on December 31, 1923. The first section of this amending Act of November 16, 1923, is this: "The Workmen's Compensation (War Addition) Acts, 1917 and 1919, shall cease to have effect after the 31st day of December, nineteen hundred and twenty-three, and are hereby repealed: Provided that the addition provided for in the said Acts shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act, 1906 (hereinafter referred to as the principal Act), or under any enactment superseded by that Act, in respect of total incapacity arising from an accident which occurred on or before the said thirty-first day of December so long as the workman remains totally incapacitated, and the addition shall, for all purposes, be treated as if it were part of the weekly payment."

Now, my Lords, in seeing whether that applies to this workman or not I first ask myself under that section: Is this a workman who is getting a weekly payment payable under the Workmen's Compensation Act, 1906? To that question there can be only one answer—he is; therefore he is entitled to what the section gives him, and the section

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says that "the addition provided for in the said Acts" (that is the repealed Acts) "shall continue to apply in respect of total incapacity arising from an accident which occurred on or before the said thirty-first day of December." His accident did occur before December 31, and therefore the addition shall continue to apply.

My Lords, the ordinary meaning of those words I think is without doubt. The "addition" means a payment. The stress that is laid on the argument on the other side is upon the word "continue." My Lords, I do not think "continue" means anything more than "shall still be made." The amount of extra money you got under the repealed Acts shall still be paid and added to the payment you are getting under the Act of 1906, provided, first of all, that your accident happened before December 31, 1923, and, secondly, so long as you, the workman, remain totally incapacitated; and therefore to my mind the words of the section are extraordinarily simple, and do not admit of any refinement at all.

The argument on the other side is this, that it does not mean to apply to all accidents which happen before December 31, 1923, and where the man is totally incapacitated, but that it only applies to those cases where the workman at the time, December 31, 1923, was de facto getting a payment for total incapacity. The argument is rested first of all upon the word "continue," with which I have already dealt, and secondly upon the words at the end of the proviso, "so long as the workman remains totally incapacitated." It is said that those words, after the other word, are words of surplusage. I do not think they are. They are said to be words of surplusage because, of course, the addition under the War Compensation Act was an addition which was phrased to be during total incapacity, and therefore it is said you need not say it twice over. But I think it is perfectly natural to say it twice over as soon as you consider the word "addition" as really meaning a pecuniary payment. And to make it quite certain that you are not going to get a pecuniary payment at any other time than when you are

totally incapacitated, the section puts in, "so long as the workman remains totally incapacitated."

Equally unconvincing, I think, is the argument upon the word "remains." It is said that "remains" points to a thing that has never been interrupted. I do not think that is the use of ordinary language. As I put it, when you say of a man that he remains asleep, that does not mean that he may not have had certain waking intervals during his sleep. I confess, speaking for myself, I think the matter is extremely simple, and that, although I entirely agree with the First Division, there is really no need for many of the refinements which I find in their judgments. Accordingly, my Lords, I move that the appeal be dismissed with costs.

My Lords, it having been arranged that these cases should be taken together, I make the same motion with regard to the case of the *Coltness Iron Co., Ld.* v. *Dalgleish.*

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, a minutely analytical treatment of a section of an Act of Parliament runs a great danger of completely destroying the purpose of the section and of emptying the clause under construction of its real sense. I am glad, after perusing the judgments of the First Division, to know that no such calamitous result has occurred in this case. For my own part, I think the clause is a tolerably simple clause and quite effective for the object it had in hand, and I prefer to consider it upon the broad and simple lines of interpretation which your Lordship has well illustrated from the Woolsack.

LORD SUMNER. My Lords, I concur in the motion which has been proposed from the Woolsack. At the same time, I am not very greatly struck with the simplicity of the language of this section, nor am I prepared to say that, when the Legislature in its wisdom thinks fit to be clearer than it has been on this occasion, it cannot contrive to be so. I share the difficulty which was felt by more than one of the learned judges who have dealt with this case in

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Scotland in bringing themselves to the conclusion at which your Lordships have now arrived. The question turns upon the words, "so long as the workman remains totally incapacitated." That certainly does appear to be the terminus ad quem of the payment which the section provides for, but I do not think it is indispensable to introduce the word "continuously" before the word "remains," and this is what the learned counsel for the appellants necessarily contend for. It seems to me that a man may substantially remain the subject of a standing description, even though there are temporary suspensions of some of its chief characteristics. A man, for example, who is afflicted with chronic rheumatism may remain a cripple, in spite of the fact that he can occasionally take up his bed and walk. After all, "totally incapacitated" is neither a precise term nor a term of art. It appears to be essentially a question of degree. In such a case as this, a man, who has been totally incapacitated, and who relapses under some circumstances into his former incapacity, might well be said to remain totally incapacitated; but I do not wish to be understood as saying, if a state of partial incapacity had become reasonably established and had a reasonable prospect of being permanent, that the proviso would then have applied in his case, merely because there was a still possible contingency of relapse into total incapacity again. I have, however, no doubt at all that the Legislature did not intend to leave such a case as this is unprotected, and I say that, not from any knowledge of what the actual intention of the Legislature may have been, outside the words used, but because, viewing these Acts as a whole, the general benevolent intention of the Legislature to claimants is abundantly plain. I therefore concur.

LORD DARLING. My Lords, I also concur, and should only desire to say that I find the reasoning in the judgment of Lord Clyde entirely conclusive, and not less so because, as has been pointed out from the Bar, it is exceedingly refined.

In each appeal:—

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 23, 1925.

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Agents for the appellants in each case: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent in the first case: *H. M. Meyler, for John Cassells, Solicitor, Hamilton, and W. G. Leechman & Co., Solicitors, Edinburgh.*

Agents for the respondent in the second case: *H. H. Wells & Sons, for Donald C. Orr, Solicitor, Hamilton, and Balfour & Manson, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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BUNGE Y BORN LIMITADA SOCIEDAD ANONIMA COMMERCIAL FINANCIERA Y INDUSTRIAL OF BUENOS AIRES . . . . . } APPELLANTS;

AND

H. A. BRIGHTMAN AND COMPANY . RESPONDENTS.

Ship — Charterparty — Demurrage — Exceptions Clause — Construction — "Obstruction beyond the control of the charterers on the Railways"— Ca' canny Strike—Obstruction preventing the provision of a cargo but not preventing loading.

In charterparties the charterer's obligation to have a cargo ready for loading at the place of loading is prima facie an absolute one, and is not affected by clauses of exception as to lay days unless by express language or necessary implication.

A ship was chartered to proceed to one or two safe ports in the River Parana and there load a full cargo of wheat and/or maize and/or rye.

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* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD BUCKMASTER.

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The charterparty provided for a daily loading rate, and it contained the following clause: "If the cargo cannot be loaded by reason of . . . . a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstruction or stoppages beyond the control of the charterers on the railways, or in the docks, or other loading places . . . . the time for loading . . . . shall not count during the continuance of such causes." The ship was ordered to Rosario, and on her arrival the charterers had not provided any cargo ready at the port, but, having decided to load wheat only, had bought a supply of wheat up-country, and this was conveyed to the port by the C. Railway, the most important of several up-country railways by which grain was carried to the port. The employees of the C. railway company carried out a ca' canny strike, which produced a general retardation of the regular traffic, and as a result the charterers had not sufficient wheat forthcoming by railway to load the ship within the lay days apart from the exceptions clause. The port was divided into two sections. In the old section the grain was loaded direct out of the railway wagons of the up-country companies. In the new section a port railway company owned a railway within the limits of the port, and at the boundary of the port took over with its own locomotives the loaded wagons from the up-country railways for distribution to the various consignees. Shortly after the charterers began to load wheat the Government prohibited the export of wheat, and the charterers, after waiting six days, began to load maize instead. The loading of the cargo exceeded the lay days by eleven days, unless extended by the exceptions clause. A claim by the shipowners for demurrage was opposed by the charterers on the ground that they were excused by the exceptions clause by reason of (1.) the ca' canny strike, and (2.) the Government prohibition. On a reference of the claim to arbitration, the arbitrator, by an award made in the form of a special case, held, as to (1.) that six days were lost by an obstruction on the railways; as to (2.) that the charterers were entitled to wait for a reasonable time to see whether the prohibition would be removed, and that six days were lost by the prohibition; but that the two periods should be regarded as coincident; and he allowed demurrage for five days. Bailhache J. held as to (1.) that there was no obstruction on the railways within the meaning of the exceptions clause; as to (2.) that the charterers were under an immediate obligation to load an alternative cargo, and he allowed demurrage for the full period. The Court of Appeal agreed with Bailhache J. as to (1.), but disagreed as to (2.), and affirmed the award on the ground that the charterers were entitled to a reasonable time to make arrangements for loading an alternative cargo. The charterers appealed:—

Held, that an obstruction, to come within the exceptions clause, must be an obstruction preventing the loading, and not one preventing the bringing of the cargo to the port, and that in the context the word "railways" was referable to the railways in the port; that there was therefore no obstruction on the railways within the meaning of the clause.

Per Lord Atkinson (the other members of the House expressing no opinion on the point): On the prohibition of the export of wheat

coming into force the charterers were entitled to a reasonable time to enable them to make other arrangements, and a reasonable time had not elapsed before they decided to load maize instead of wheat.

Decision of the Court of Appeal [1924] 2 K. B. 619 affirmed.

APPEAL from an order of the Court of Appeal (1) setting aside an order of Bailhache J. and affirming an award in the form of a special case made in an arbitration between the appellants and the respondents upon a claim for demurrage under a charterparty dated April 14, 1920.

The appellants were the charterers and the respondents were the owners of the steamship *Castlemoor*.

The ship arrived at Rosario on May 17, 1920, and it was agreed that loading time began to run at midnight, May 19-20, 1920, and, subject to any extension by reason of the application of any of the exceptions in the charterparty, expired at 4 P.M. on June 4, 1920. The loading began in fact on May 20, 1920, and finished at 11 A.M. on June 15, 1920.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Lord Dunedin, and they are summarized in the headnote.

The arbitrator found that the ca' canny strike on the Central Argentine Railway was an obstruction on the railway, and that it caused a delay of six days in bringing the cargo to the port of Rosario, but that such six days should be regarded as coincident with the six days lost by the prohibition of the export of wheat—namely, six days from June 4 to June 9 inclusive; that the appellants desired to load wheat and not maize, and that they were not bound to load maize; that in any event they were entitled to wait for a reasonable time in order to see whether the wheat prohibition was removed, and that a reasonable time had not expired by June 10 when they began to load maize; and, subject to the opinion of the Court, he held that the respondents (the claimants) were entitled to recover demurrage for the period from 4 P.M. on June 10 to 11 A.M. on June 15—namely, four days nineteen hours.

In answer to a request from the Court of Appeal for further

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information as to the meaning of these findings, the arbitrator explained that the nature of the ca' canny strike was such that he could not find that any specific hours were lost on any specific day, but that its effect was such that, whereas apart from the strike the *Castlemoor* would have completed her loading on June 4, the strike so affected the supply of wheat that the completion of the loading would have been delayed till June 9, and that the period from June 4 to 9 inclusive was what he meant by the loss of six days. He found further that the wheat prohibition was operative from June 4 to 11 inclusive, but that on June 10 the charterers began to load maize on the *Castlemoor*. Therefore, as regards the period of six days from June 4 to 9 inclusive, he found that the wheat prohibition and the results of the strike were both operating, and that was what he meant by his finding that the six days' loss caused by the obstruction on the railway was to be regarded as coincident with the six days' loss by reason of the wheat prohibition.

Bailhache J. held (1.) that there was no obstruction on the railways within the meaning of the exceptions clause, and (2.) that on the prohibition of the export of wheat coming into force the appellants were under an immediate obligation to load one of the alternative cargoes, and he varied the award by holding that the respondents (the claimants) were entitled to a further allowance in respect of the six days disallowed by the arbitrator.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) held that there was no obstruction on the railways within the meaning of the exceptions clause, but as regards the wheat prohibition that the appellants in the circumstances were entitled to a reasonable time to alter their arrangements, and they affirmed the award on this ground.

The appellants appealed and claimed that they were excused by the exceptions clause from any liability to pay demurrage. There was no cross-appeal by the respondents.

1925. June 16. *Jowitt K.C.* and *Van Breda* for the appellants.

The wording of the exceptions clause is sufficiently wide to cover the operation of bringing the cargo to the port as well as the actual operation of loading. "Obstruction on the railways" includes the difficulty of getting the railway wagons to the place of loading. The wagons are there dealt with not as part of the machinery of loading, but as vehicles for the transport of the cargo to the ship: *Furness* v. *Forwood Brothers & Co.* (1); and see *In re Richardsons and M. Samuel & Co.* (2), and *Lilly & Co.* v. *Stevenson & Co.* (3) *The Rookwood* (4), unless distinguishable, was wrongly decided. See the comments on that case in Carver's Carriage by Sea, § 257*b*, note *h*. The word "railways" in this clause cannot properly be confined to the railways in the port as distinct from the up-country railways. The ca' canny strike was an obstruction on the railways within the meaning of the clause. The earlier days from May 20 to June 3 were not complete days by reason of the ca' canny strike, and the six days thereby lost were in addition to and not coincident with the six days lost by the prohibition of the export of wheat. Therefore the time of loading had not, having regard to the exceptions, expired when the loading was completed, and no demurrage was due. If the charterers were prevented from bringing their cargo down to the port they were entitled to a reasonable time to make other arrangements.

Le Quesne K.C., *Sir Robert Aske* and *McNair* for the respondents were not called upon.

The House took time for consideration.

1925. July 24. LORD DUNEDIN. My Lords, by a charter-party dated April 14, 1920, the steamship *Castlemoor* was chartered by the respondents to the appellants upon the terms and conditions therein set out. The steamer was to proceed to one of certain ports in the River Parana, where it was to receive from the charterers a cargo of wheat and/or maize and/or rye. The steamer was to be loaded at the rate

(1) (1897) 2 Com. Cas. 223.
(2) [1898] 1 Q. B. 261.
(3) (1895) 22 R. 278.
(4) (1894) 10 Times L. R. 314.

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of 500 tons per day, and demurrage was payable at the rate of 250*l.* per day. Provision was made as to the commencement of the lay days.

The charter contained the following clause: "Clause 30. If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lockout of any class of workmen essential to the loading of the cargo or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . . the time for loading . . . . shall not count during the continuance of such causes. . . . . In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage shall be made by . . . . the owners of the steamer. . . . ."

The *Castlemoor* was duly ordered to Rosario to load. She arrived in the Roads on May 17, 1920. Notice of readiness was duly given at 9 A.M. on May 19, and it was agreed that her lay time began to run at midnight on May 19–20. The cargo eventually loaded consisted of 5830 tons, and it was agreed that this gave her as lay days eleven days sixteen hours. Loading began on May 20 and finished on June 15 at 11 A.M. The respondents contended that the lay time expired at 4 P.M. on June 4, and they claimed demurrage from thence to the completion of the loading as aforesaid—namely, ten days nineteen hours at 250*l.* per day—2698*l.* The appellants contended that no demurrage was due on the ground that the delay complained of by the claimants was due to causes beyond their control, expressly excepted by cl. 30 of the said charterparty.

Specification of various causes for the delay was made by the appellants, none of which need be now mentioned, except two. These were: (1.) A labour disturbance on one of the railways supplying Rosario, which was the port to which the steamer was sent; and (2.) a prohibition by the Government of all exportation of wheat during the period June 4 to 11.

The parties went to arbitration before Mr. Raeburn K.C. He issued an award in the form of a special case. In his

award he dealt with the alleged causes of delay said to fall within the exceptions as follows :—

He found as a matter of fact that none of the alleged causes existed save the two above specially mentioned. As regards (1.), he described the port of Rosario in the following terms : "The port of Rosario is situated on the River Parana and has a river frontage of about eight miles. The port is divided into two sections—namely, the Old or Cliff Section, and the New or Port Section. In the Old Section there are no wharves, but ships come alongside the natural cliff and the grain is loaded by chutes and pipes direct into the hold out of the grain warehouses which are situated along the top of the cliff, or out of railway wagons on the sidings running along the top of the cliff. . . . . In the new section there are wharves along the entire river front which are served by railway lines running to the store sheds on the quay. Loading is carried out by means of travelling belts and chutes, either from the sheds or from railway wagons direct." And he then found as follows : "On May 15, 1920, there broke out on the Central Argentine Railway a movement on the part of the men, which was described as a 'go slow' or 'ca' canny' movement, and lasted till June 6. It was a concerted scheme on the part of the employees of the company, designed to force the company to withdraw certain regulations which the Government had compelled them to impose, and which were obnoxious to the men. The method adopted by the men was to continue at work during proper working hours, but by means of extravagantly strict adherence to the various rules of the company in regard to the working of traffic and the performance of their ordinary duties, so to delay the working of the traffic as to reduce it to a minimum, without at the same time giving to the railway company any specific ground for dismissal. I hold that this was an 'obstruction' on the railway, and I find that it caused in all a loss of six days. It caused delay however only in bringing cargo to the port of Rosario and in no way affected the actual process of loading." As regards (2.) he found as follows : "I find as a fact that the

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respondents desired to load wheat and not maize, and I hold that they were not bound to load maize. In any event, however, I hold that the respondents were entitled to wait for a reasonable time in order to see whether the wheat prohibition was removed, before beginning to load maize, and I find that a reasonable time had not expired by June 10 when in fact they began to load maize. From June 10 onwards the respondents loaded maize, and I find therefore that the delay due to the wheat prohibition was six days only—namely, from June 4 to 9 inclusive."

Upon these findings his judgment was that subject to the opinion of the Court he held that the claimants are entitled to recover demurrage for the period from 4 P.M. on June 10 to 11 A.M. on June 15—namely, four days nineteen hours, and he accordingly awarded that the appellants do pay to the respondents the sum of One thousand one hundred and ninety-eight pounds (1198*l.*) together with the respondents' costs of the arbitration and do bear and pay the cost of the award.

The special case came before Bailhache J. He confirmed the judgment of the arbitrator as to the "ca' canny" strike, but differed as to the wheat prohibition, and allowed demurrage for the six days disallowed by the arbitrator.

Appeal was taken to the Court of Appeal, who restored the judgment of the arbitrator.

It will thus be seen that there were two separate questions which arose on the charterparty. The charterer excused his delay on two separate grounds, both of which he said fell within the exceptions allowed in the charterparty for the duty of loading within the stipulated time. There was the ca' canny strike and the prohibition of exportation of wheat. Now the ca' canny strike did not in any way affect the actual operation of the loading of the cargo: it only affected the provision of the cargo to be loaded. To make it a cause of justification it must fall within the following words: "If the cargo cannot be loaded . . . . by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . .

the time for loading shall not count during the continuance of these causes." On this point I am entirely in agreement with the judgment of Scrutton L.J., and I am only repeating what he has so clearly explained when I say that the general rule is absolutely authoritative to the effect that if you wish to make an exception apply to the providing of cargo as distinguished from the loading proper, you must do so in words so clear as to admit of no ambiguity.

In my opinion that has not been done here. The word "railways" is in concatenation with the word "docks," and points, I think, to the use of a railway as one of the instruments of loading, a use which in the actual case before us is amply justified by the existence of the port railway and the rails along the cliff. It is, I think, most expedient that the general rule should not be infringed or whittled down.

Scrutton L.J. quoted with approval some expressions of mine used in a case decided in the Court of Session. (1) I should like to say that I was laying down no new law of my own pronouncement, but was only stating what I thought was the clear result of the decisions of this House.

As regards the prohibition of wheat excuse, what happened was this: Bailhache J. had held that it was no answer to say that the exportation of wheat had been prohibited, because there was an alternative in the charterparty to load maize or rye, and if the charterer could not get wheat he must have a cargo of maize or rye ready, and that consequently no allowance was due in respect of the prohibition. The learned judges of the Court of Appeal took a different view. They held that as to providing a cargo, the charterer must provide maize or rye if he could not get wheat, but that having made his arrangement for wheat and the prohibition against exportation coming like a bolt from the blue after these arrangements were made, he ought to be allowed a reasonable time, which they fixed at six days, to make other arrangements, and they accordingly allowed six days' excuse in the calculation of the demurrage due. Against that judgment the respondents did not cross-appeal, and no arguments,

(1) *Arden Steamship Co.* v. *Mathwin & Son* 1912 S. C. 211, 215.

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on a question on which much argument was possible, were presented to your Lordships. I am not saying that I think the judgment was wrong, but I wish it to be distinctly understood that I have not formed and do not express any opinion on the question whether the judgment of Bailhache J. on this head or the judgment of the Court of Appeal in its variation ought to be preferred.

I move that the appeal be dismissed with costs.

My Lords, I am authorized by the learned Lord Chancellor to state that he agrees in this judgment.

LORD ATKINSON. My Lords, the 30th clause of the charterparty in this case, upon the true construction of which this appeal mainly turns, deals with the prevention of the loading of a cargo on board the ship *Castlemoor* by any one or more of the several means enumerated in the charterparty. The cargo which she was bound to take on board was a cargo of wheat and/or maize and/or rye and/or linseed and/or rape seed in bags and/or in bulk. The charterers, the appellants, bound themselves on their side to ship such a cargo on the *Castlemoor* not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture. The provisions of this clause which are material have been already read.

The charterparty bears date April 14, 1920, and by it the ship was bound to load as much of her cargo at one or more safe loading ports on the River Parana not higher up the river than Lorenzo, as the master should consider safe, and the balance of the cargo at Buenos Aires or La Plata, at the charterer's option. By cl. 12 of this charterparty it is stipulated that lay days shall not commence before May 10, 1920, unless the charterers begin loading sooner, and should the steamer not be ready to load at 6 P.M. on May 31, 1920, the charterers were given the option of cancelling the charterparty.

Clause 13 of this same document providing for the times of loading has also been read.

The arbitrator in the third paragraph of the special case

which he has stated finds that the *Castlemoor* was duly ordered to Rosario to load, that she arrived there on May 17, 1920, that notice of her readiness to receive cargo was duly given on at 9 A.M. on May 19, that it was agreed that her lay time began to run at midnight on May 19–20, that she had as lay days eleven days sixteen hours, and that loading began on May 20 and finished on June 15 at 11 A.M. The shipowners, he states, contended that the lay days expired on June 4 and claimed demurrage from thence to the completion of the loading, i.e., for ten days nineteen hours, amounting, at the stipulated rate, to 2698*l*. The charterers on the other hand, he states, contended that no demurrage was due, on the ground that the delay complained of was due to those causes beyond their control specially excepted by the aforesaid 30th clause of the charterparty. The contour and physical features of the harbour of Rosario demand consideration, as well as the methods by which the business of the port was carried on.

In the case stated (para. 7) the arbitrator describes the system under which cereals are collected for shipment at the port of Rosario and are there shipped. He says the cereals are purchased by the exporters from the growers living in the interior; that it is the duty of the latter to deliver the grain at the railway station or stations specified in the sale note, and also to apply to the appropriate railway company for the wagons necessary to load this grain therein, and convey it to the port of shipment. The loading of the wagons at the up-country stations is done by labourers employed by the seller, and when so loaded these wagons are hauled to the port of Rosario. It was not proved or found that there were any depots, or loading places, as they have been styled, in any instance up-country where vast quantities of cereal were collected, and a buyer could readily obtain his needed supply. Nor was there any evidence given or any finding arrived at that any particular portion of the wheat brought to Rosario by the procurement of the charterers was by them specifically appropriated to the purpose of providing a cargo for the *Castlemoor* in whole or

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in part. The port of Rosario, the arbitrator finds, is divided into two sections—the Old or Cliff Section, and the New or Port Section. In the former of these there are no wharves, so that ships seeking to be loaded there are simply brought alongside and the grain is loaded by chutes and pipes direct into the hold of the ship out of the grain warehouses, which are situate along the top of the cliff, or out of the railway wagons standing on the sidings running along the top of the cliff. Certain of the railway companies connecting Rosario with the up-country, of which the Central Argentine Railway Company is the most important, have lines running direct to this cliff, and the sheds thereon. In the New or Port Section the condition of things is entirely different. The Rosario Port Company owns practically all the warehouse accommodation and all the railways within that section. These latter railways are connected with five different lines serving the port, of which, as in the other section, the Central Argentine is the most important. The loaded wagons brought by these five railways are upon their arrival at the boundary of the port zone, where the port railway begins, taken over by the employees of the Port Company, thereafter hauled and worked by locomotives and machinery belonging to the Port Company and ultimately distributed to the various exporters to whom the grain is consigned. On May 15, 1920, two days before the *Castlemoor* arrived at Rosario, a ca' canny movement, or strike as it has been styled, broke out on the Central Argentine Railway and lasted till June 6 following.

The arbitrator held that this so-called strike amounted to an "obstruction" on the railway within the meaning, as I understand his award, of the 30th clause of the charter-party, that it caused in all a loss of six days, but that the delay only affected the bringing of the cargo to the port of Rosario, and in no way affected the actual process of loading. It is not found, nor even pretended, that this so-called ca' canny strike extended to or in any way affected any of the four remaining railways which run up the country from the port of Rosario. There is no evidence whatever

that the charterers endeavoured to tap sources of supply in the interior from which wheat might be carried to Rosario by one or more of these four railways unaffected by the ca' canny strike. That strike might no doubt obstruct the business and impede the transport of grain by the particular railway it affected, but that obstruction is not the particular kind of obstruction to which the 30th clause of the charter particularly relates. The words of that clause are: "If the cargo cannot be loaded by reason . . . . of obstructions . . . . on the railways." It certainly would appear to me that an obstruction which only affects one of these five railway lines and leaves, for all that appears, the remaining four lines free from obstruction, able and willing to effect the needed transport of wheat from the up-country to the port, does not satisfy the words of cl. 30.

I think the authorities establish that this is so. The case of *Grant & Co.* v. *Coverdale, Todd & Co.* (1) deals with the essential difference between the duty of having a cargo at a place from which it can be loaded on a particular ship, and the actual physical act of loading that cargo on that ship, and decides that when provisions are introduced into a charterparty excepting either the charterers or the shipowner from liability in certain events or under certain conditions it is essential to determine to which of those two operations these provisions apply. Prima facie it is the absolute duty of the charterers to provide the cargo and bring it to the place of loading, and it is equally the absolute duty of the shipowner to load the cargo when so brought. No doubt provisions may be introduced into a charterparty which relieve these respective parties from some of the duties and obligations prima facie imposed upon them respectively; but to have these effects these provisions must be clearly and distinctly expressed.

The cases of *Hudson* v. *Ede* (2) and *The Rookwood* (3) have a direct bearing upon this case. They are referred to in para. 257*b* of the fourth edition of Carver on Carriage

(1) (1884) 9 App. Cas. 470. (2) (1868) L. R. 3 Q. B. 412.
(3) 10 Times L. R. 314.

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by Sea, and are treated as establishing the proposition that where, as in this case, the place from which a cargo is to come is not specified, the general rule is that the charterer is not excused unless all practical modes of loading have been prevented. *Hudson* v. *Ede* is a case of great authority. It was decided in the Exchequer Chamber by Kelly C.B., Willes, Keating and Montague Smith JJ., and Bramwell and Channell BB. There, according to the headnote, the charterparty provided that the ship chartered should proceed to Sulina or outside in sufficient depth of water to load, and there load from the agents of the merchants named a complete cargo of grain, the cargo to be brought and taken from alongside the ship at the ports of loading and discharge at the charterers' expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days in demurrage over and above the laying days at 6*l.* per day. Detention by ice and quarantine not to be reckoned in laying days. There were no storehouses at the port of Sulina itself: the grain shipped was kept at places higher up the Danube, and brought by steam lighters down the river and loaded directly into ships waiting there to take their cargo. The ship in this case, *Tria* by name, being ready to load, gave notice to the charterers of that fact; but after six days and before any cargo had been supplied the river immediately above Sulina became frozen over, and so continued to be for two months, the port of Sulina itself remaining open. It was held that this amounted to "detention by ice" within the meaning of the charterparty. Kelly C.B., in delivering the judgment of the Court, after stating the facts, said (1): "Under these circumstances, we are of opinion that this was a detention by ice within the meaning of the charterparty. The conveyance by the river between Galatz and the ship at Sulina may be considered as a part of the act of loading, and as there were no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore, from which, of necessity, the grain must be brought, and the vessel in which it was

(1) L. R. 3 Q. B. 414, 415.

to be loaded, and so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against." In the last paragraph of his judgment the learned Chief Baron said: "My brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply." In the present case the sources of supply were up the country where the growers lived. If all communication between those places and the port of Rosario, where the ship lay, was absolutely and entirely cut off, this case would be applicable to the present case, but as things were it is rather an authority to the effect that where communication is not cut off at all, the obstruction cannot be taken as an obstruction within the meaning of cl. 30 worded as that clause is, and that where communication is only to some extent obstructed or impeded on one of the lines of railway connecting the port with the interior of the country where the cereal is produced and sold, it is an authority to the effect that the charterers who are not found to have availed themselves of any of the alternative routes are not entitled to contend that the "cargo cannot" be loaded within the meaning of cl. 30 by reason of the ca' canny obstruction on one of the five railway lines.

In *Stephens* v. *Harris & Co.* (1) Bowen L.J. (as he then was), in referring to *Hudson* v. *Ede* (2), said: "It is catching at a phrase used by Chief Baron Kelly, in delivering judgment in the Exchequer Chamber, to say that the loading can commence 100 miles away from the ship. The decision rested upon the fact that there was only one mode of loading grain cargoes at Sulinah—namely, by lighters bringing the grain down the river from Galatz." In my view the appellants have failed to show that such obstruction as may have existed on the Central Argentine Railway caused by the strike amounted, while the strike lasted, to an obstruction within

(1) (1887) 57 L. J. (Q. B.) 203, 209. (2) L. R. 3 Q. B. 412.

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the meaning of cl. 30 of the charterparty, and that the charterers were not entitled under that clause to the exemption they claimed.

On the other point I think that when the export of wheat was prohibited and the charterers had to make up their minds what was to be done in this altered condition of things, they were entitled to a reasonable time to determine how to deal with those altered conditions, and that then a reasonable time for this had not elapsed before they proceeded to substitute maize for wheat in loading the *Castlemoor*. I am, therefore, of opinion that the appeal fails and should be dismissed.

LORD SUMNER. My Lords, this is a voyage charter, in which the lay days became fixed by reason of the combined effect, in the events which happened, of the undertaking to load a full cargo and of the provision for a daily loading rate per running day, Sundays and holidays excepted. The lay days so fixed were in fact exceeded. The question is whether the charterers—now appellants—can relieve themselves from the consequent obligation to pay demurrage, by any of the exceptions mentioned in cl. 30. The charter form is one arranged and agreed with the Centro de Cereales of Buenos Ayres and is the Chamber of Shipping River Plate Charterparty, 1914, known by its code name of "Centrocon." The answer to the question turns on the construction of cl. 30 of that form, as applied to the circumstances of this case.

The material facts are that the charterers elected to load at one port, Rosario, under the option given in cl. 3 to load at "one or two safe loading ports or places in the River Parana but not more than the steamer can safely carry over Martin Garcia Bar (without lightening) and the balance of the cargo in the port of Buenos Aires or La Plata," and the excepted hindrances to loading, which are now relied on, are (*a*) "strike or lock-out of any class of workmen essential to the loading of the cargo" and (*b*) "obstructions beyond the control of the charterers on the railways or in the docks or other loading

places." The vessel was not loaded in a dock, but lay alongside a wharf and received the cargo from railway trucks, in which the wheat, bought by the appellants up country and appropriated by them to the *Castlemoor* on arrival of the trucks in the port of Rosario, was brought alongside on the railway lines and was thence transferred to the ship's hold. To whom these railway lines belonged is not certain. In one part of the port the lines on the wharf belong to the Central Argentine Railway Company; in another to a separate company, which owns and operates a railway within the limits of the port. In which part of the port the *Castlemoor* loaded the case stated does not show. The charterers had not provided any cargo, ready in the port of Rosario for the *Castlemoor*, though the port contains ample warehouse accommodation, and loading ex warehouse is an accustomed mode of loading. The charter gave the charterers the option to load "wheat and/or maize and/or rye," but they had for their own reasons decided to load wheat only, and did not in fact change their plans till after the lay days had expired, unless they were extended by the operation of the exceptions clause. Wheat is bought at country railway stations on any of the five lines which serve Rosario, and thence is sent to the port by the buyers and shippers. The appellants had made purchases so as to provide themselves with a general supply, if the wheat arrived in due time at Rosario, but for the provision of cargo for any particular ship they relied on the regular flow of wheat down the railways to the port. During the *Castlemoor's* lay days the employees of the Central Argentine Railway up country, which is the principal grain transporter of the five companies, carried out a "ca' canny" or "stop in" strike, working pedantically and even preposterously to the extreme letter of their rules, in order to produce, as they did produce, delays to regular traffic on the railways without incurring the consequences of a strike or losing the emoluments of regular work or making themselves individually liable to summary dismissal for failing to do their duty. Although this general retardation of traffic undoubtedly affected the supply of wheat to Rosario, and in particular

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seriously affected the business arrangements of Messrs. Bunge y Born, there was not shown to have been any particular hindrance of the wheat which they had bought or, so far as concerned them, anything but a general dislocation of their arrangements. In the result they had not sufficient wheat forthcoming by railway to enable them to load the ship within the lay days, unless they got relief under cl. 30.

The established rule, that in charterparties the charterer's obligation to provide cargo and have it ready for loading at the place of loading is prima facie an absolute one and is not affected by clauses of exception as to lay days unless by express language or necessary implication, is not artificial or arbitrary. It is correlative to the shipowner's obligation to provide a seaworthy ship before an exception of marine perils in a bill of lading can apply to relieve him. It arises out of the nature of the contract, and is necessary to the practical distribution of the risks involved in its performance. Most charters are so framed that their structure furnishes a sufficient basis for the rule, and that now in question is a good example. By cl. 2 the shipowners engage that the steamer shall proceed to the loading port and there receive from the charterers a full cargo, which they bind themselves to ship. Clause 12 fixes the commencement of the time for such delivery and receipt, and cl. 13 fixes the time within which the charterers engage to load the full cargo. Clause 4 engages the shipowners to carry it to its port of discharge and there deliver it. These (apart from payment of freight and minor matters) are reciprocal and absolute obligations, to load on the one hand and to carry on the other, and it is upon these obligations that exceptions are introduced by cl. 29 in favour of the shipowner and by cl. 30 in that of the charterer. Clause 30 provides that if the cargo (that is the full and complete cargo which the charterer has already engaged to ship) cannot be loaded owing to certain causes, the time for loading is not to count during the continuance of such causes. It appears to be quite plain, even if there were no authorities upon the subject, that the exceptions,

for which cl. 30 provides, would not extend to anything but interference with loading a cargo ready to be loaded, unless something in the clause itself shows that exceptions preventing the charterers from providing a ready cargo are included as well as exceptions preventing them from loading it when ready. My Lords, I think that nothing is to be found in this clause which could apply to the hindrances out of which the charterers' difficulties arose. There was no "stoppage" on the railways—that was just what the strikers ingeniously avoided. Whether their inaction could be said to amount to an "obstruction" or not we need not consider, though the workmen did not cause any physical obstruction, but in any case the words "on the railways" are satisfied by referring them to the railways in the port, which were regularly used as part of the machinery of loading a ready cargo. The case is not within the well-known principle of *Hudson* v. *Ede* (1), so often explained in later cases and most recently by your Lordships in the *Owners of S.S. Matheos* v. *Louis Dreyfus & Co.* (2) It is not one of those cases, where a specific cause is mentioned, which has to be referred to something extraneous to the place and operation of loading, because nothing bearing that designation is found in that place and operation at all. Such were the railways mentioned in *Furness* v. *Forwood Brothers & Co.* (3) and *In re Richardsons and M. Samuel & Co.* (4); such, too, is a mention of collieries or mines in an ordinary coal charter. It follows that the charterers fail to excuse themselves from the consequences of not having completed the loading before the day now in question arrived, and that the appeal fails.

My Lords, I would add this. Although the words of such a clause, if clear, must prevail whatever the business consequences may be, I am glad that the construction of the words in question does not constrain us to adopt the charterers' contentions. It was in their option to load at two ports, and all the ports to which their option extends are served by railways, whose systems cover an enormous aggregate mileage in the

(1) L. R. 3 Q. B. 412.
(2) Ante, p. 654.
(3) 2 Com. Cas. 223.
(4) [1898] 1 Q. B. 261.

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interior of the Argentine Republic. It was in their power to purchase the cargo at any points, however numerous, on those systems, and, on their contention, they could then throw on the ship the risk of delay in loading, if any obstacle on any of these railways hindered performance of the obligation to load. For the merchant to exercise in the amplest sense the right to buy where he wills and then to leave so much of the hazard of it to fall on the shipowner, who had no voice in the matter and no means of foreknowledge that would enable him even to measure his risk, is an arrangement that I cannot believe any merchant would venture to propose or any shipowner would consent to adopt.

LORD DUNEDIN. My Lords, I am authorized by my noble and learned friend Lord Buckmaster to say that he concurs in the motion proposed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 24, 1925.

Solicitors for the appellants: *Richards & Butler.*

Solicitors for the respondents: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

[PRIVY COUNCIL.]

WING LEE . . . . . APPELLANT;

AND

D. C. LEW . . . . . RESPONDENT.

J. C.*
1925
May 11.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

New Trial—Jurisdiction of Appellate Court—Conditional Order for New Trial—Damages for Tort—Death of Plaintiff after Judgment set aside.

If the exercise, without control or limitation, of the discretionary power to grant a new trial may produce what appears to be a manifest injustice, it is well within the power of the Court in making the order to provide against the risk of injustice arising.

In an action in British Columbia for damages for malicious prosecution the plaintiff recovered a verdict and judgment for $5490. The Court of Appeal of that Province set aside the judgment and ordered a new trial. The plaintiff appealed to the Supreme Court of Canada, but died before the hearing of the appeal. The Supreme Court made an order providing for a new trial as to the damages, and that upon the new trial the original judgment should stand, unless the defendant submitted to a condition that no exception should be based upon the fact that the plaintiff was dead:—

Held, that the Supreme Court, having all the powers of the Court of Appeal of British Columbia, had power to impose the above conditions upon the defendant.

Watt v. *Watt* [1905] A. C. 115 distinguished.

Griffith v. *Williams* (1830) 1 Cr. & J. 47 and *Palmer* v. *Cohen* (1831) 2 B. & Ad. 966 approved.

Judgment of the Supreme Court affirmed, subject to a slight modification.

APPEAL (No. 20 of 1925) by special leave from a judgment (November 19, 1924) of the Supreme Court of Canada varying a judgment (January 8, 1924) of the Court of Appeal of British Columbia.

The plaintiff, D. C. Lew, since deceased and represented by the respondent, brought an action in the Supreme Court of British Columbia for damages for malicious prosecution. He claimed $490 as special damages and $5000 as general damages. The jury returned a verdict for $490 as special damages, and $10,000 as general damages. The trial judge entered judgment for the plaintiff for $5490.

* *Present:* LORD BUCKMASTER, EARL OF OXFORD AND ASQUITH, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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The defendant appealed to the Court of Appeal of British Columbia, which set aside the judgment and ordered a new trial.

The plaintiff appealed to the Supreme Court of Canada, but died before the hearing of the appeal.

The present appellant, having been appointed administrator of the estate of the plaintiff, applied by motion to the Supreme Court for leave to file "a suggestion of the plaintiff's death." Sect. 84 of the Supreme Court Act (R. S. Can., 1906, c. 139) provides for the continuance of a suit upon the death of a sole appellant upon the leave applied for being obtained. The judge in chambers ordered the motion to stand over until the trial.

Order XVII., r. 2, of the Rules of the Supreme Court of British Columbia deals with the abatement of suits in the same terms as Order XVII., r. 2, of the English R. S. C.

The Supreme Court held that as by the above mentioned rule it is provided that "whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered," the right of enforcing a judgment and of defending a judgment obtained a fortiori survived to the personal representative. The Court further held that the cause of action was not the original cause, but in substance the alleged error that intervened in the Court of Appeal. Dealing with the verdict, they held that the general damages were excessive, that the judge had no power to enter judgment for a lower sum, and that as the defendant had a statutory right to have damages assessed by a jury (R. S. B. C., 1911, c. 58, s. 53, Order XXXVI., r. 2) the case did not fall within Order LVIII., r. 5A. They decided, however, that the verdict and judgment for $490 special damages should stand, and that the Court had power to impose conditions on the grant of a new trial having regard to the circumstances of the case.

An order was made that upon a proper "suggestion of death" being filed the judgment of the Court of Appeal should be set aside and the judgment of the trial judge

restored, unless the defendant should elect, by writing to the registrar, for a new trial limited to the reassessment of the general damages and subject to the condition that no exception based on the death of the plaintiff should be taken upon the new trial; and that judgment be entered for the amount found as of the date of the verdict in part set aside; provision was made also for the restoration of the judgment for $490 special damages.

The judgment of the Supreme Court is reported at [1924] S. C. R. 612.

1925. May 10. *Hon. Sir M. Macnaghten* and *T. Mathew* for the appellant.

W. A. Barton for the respondent.

[Reference was made to *Watt* v. *Watt* (1); *Stace* v. *Griffith* (2); *Lionel Barber & Co.* v. *Deutsche Bank* (3); *Griffith* v. *Williams* (4); *Palmer* v. *Cohen* (5); and to the rules of Court and statutory provision above mentioned.]

May 11. The judgment of their Lordships was delivered by

LORD BUCKMASTER. This appeal arises out of a dispute which was originally nothing more serious than a quarrel between two adjacent landowners. On December 28, 1922, an information was issued by the appellant against one David Lew charging him with having removed a landmark that lay between his property and what David Lew claimed as a road. That information failed, and David Lew accordingly took proceedings against the appellant, claiming damages for malicious prosecution. On June 28, 1923, verdict and judgment were given in that action, the result of which was that David Lew obtained a judgment for $5490 and costs. This sum was a modification of the verdict which the jury were anxious to give, for they desired to assess what they called the general damages at $10,000, and the special damages at $490. As in

(1) [1905] A. C. 115.
(2) (1869) 6 Moo. P. C. (N. S.) 18.
(3) [1919] A. C. 304.
(4) 1 Cr. & J. 47.
(5) 2 B. & Ad. 966.

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the later stages of these proceedings some questions arise about the $490, it is as well to state that they appear to have been the sum which David Lew claimed as the out-of-pocket expenses to which he had been put in the course of the prosecution that had failed; these sums were, for reasons which are not very apparent, treated by the jury as an independent head of damages, and were so returned in the verdict. The judgment thus given in favour of the plaintiff was not destined to remain unchallenged. The defendant applied to have the judgment set aside, and on January 8, 1924, the Court of Appeal of British Columbia set the judgment aside and ordered that a new trial should be had. Thereupon the plaintiff appealed against that judgment, but after he issued his notice of appeal, and before the hearing, he appears to have been murdered. His personal representative is the present respondent, who took steps to bring the appeal on before the Supreme Court of Canada by the necessary motions, the hearing of which was adjourned till the appeal itself came on.

The appeal was heard on November 19, 1924, and on its hearing the first question discussed was: Whether or not the notice of motion to file suggestion as to the death could be properly entertained or not. The Supreme Court held that it could, and that in the circumstances the legal personal representative was fully entitled to prosecute the appeal. That question occupied a substantial part of the judgment of the Supreme Court; as against it very little, if any, argument has been advanced before this Board, and their Lordships are clearly of opinion that in that respect at least the judgment of the Supreme Court was perfectly accurate.

There remains what is the real controversy upon the present appeal. The Supreme Court decided that the judgment could be dealt with under two heads, the special and the general damages, that the judgment for $490 was damage which in any case must be recovered if the cause of action was well established, and they saw no reason for thinking that there was any fault in the verdict of the jury upon this point. It followed in their opinion that the $490 at

least was a sum for which judgment must be obtained, and that the question as to what further sum should be added for general damages was a matter which a new jury should be called upon to assess.

The Supreme Court expressly declined the jurisdiction to fix these damages on their own account, because they thought that Order LVIII., r. 5A, had no application to cases where the party had of right under the statute the power of having the dispute determined by a jury. In the view that their Lordships take of this appeal, it becomes unnecessary to decide whether the Supreme Court were right or wrong in that opinion; they only desire to have it recorded that their omission to discuss that part of the judgment must not be interpreted as expressing their approval of the conclusion to which the Supreme Court came. The remaining part of the judgment was this: They held that there should be a new trial as to the damages, and that that new trial should be conditioned by a provision that the original judgment should stand, unless the defendant submitted to a condition that no exception at the hearing should be based upon the fact that the plaintiff was dead. The real question is whether or no the Supreme Court acted within their powers in imposing such a condition upon the defendant. Their Lordships think that the authorities referred to in the judgments of the Supreme Court are sufficient justification for the course they took. It is perfectly true that when it is said, as it was in *Watt* v. *Watt* (1), that the right to a new trial is a right which is based upon discretion, it none the less follows that the discretion being judicial must be based on sound principles and cannot be arbitrarily exercised; but if the exercise of the discretion without control or limitation may produce what appears to be a manifest injustice, it is well within the power of the Court in exercising such a right to take steps to prevent that injustice should arise. That appears to have been the reasoning that persuaded the Court in *Griffith* v. *Williams* (2), where a matter which appears to

(1) [1905] A. C. 115. (2) 1 Cr. & J. 47.

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their Lordships to be identical with the present came up for consideration. In that case there had been a verdict obtained in assumpsit for breach of promise to marry, and a rule nisi had been granted for a new trial upon the ground that the verdict was contrary to the evidence. Before the rule came up for final argument the plaintiff died, and the question then arose as to what ought to be done; it was argued on behalf of the plaintiff that the setting aside of the verdict would entirely defeat justice, as no new trial could be had without error being assignable upon the record. It was to this argument that the Court answered that they should have no difficulty, because if they thought the case required further consideration they could have imposed the terms of the verdict being entered as of the assizes when the case was first tried, or of the defendant undertaking not to assign error. The question came up again in the case of *Palmer* v. *Cohen* (1), and there Lord Tenterden, a judge paramount for his knowledge, made a statement to which great importance should be attached. The point arose in this way: In an action for libel, the plaintiff obtained a verdict, and died after the verdict had been obtained. His successor entered up judgment, and a rule nisi was obtained to set this aside with costs on the ground that the executor could not enter up judgment on a verdict obtained by his testator when the right of action died with the testator. The discussion took place notably upon the two statutes of 17 Car. 2, c. 8, and 8 & 9 Will. 3, c. 11, but in the argument in support of the rule it was argued that if the executors could enter up judgment they would have an undue advantage, for the defendant in such a case could not move for a new trial, and it was in answer to this that counsel, who showed cause against the rule, quoted *Griffith* v. *Williams* (2), and pointed out what had been done there. Lord Tenterden answered that it might be done "in an action of this kind as well as in a mere action of debt."

Their Lordships think that that is abundant authority to

(1) 2 B. & Ad. 966. (2) 1 Cr. & J. 47.

support the condition which the Supreme Court of Canada has imposed upon the leave to obtain a new trial in the present case.

There is the remaining and slender argument that the circumstances of both those cases differ from the present in this, that the Court of Appeal of British Columbia having in fact overthrown the original judgment before the plaintiff died, the conditions which might have been imposed by them could not be imposed by the Supreme Court of Canada; but in truth the provisions of the Act which enable the Supreme Court of Canada to exercise all the powers of the Court below appear sufficient to remedy the mischief. The hearing before the Supreme Court is in fact and effect the equivalent of a full rehearing of the whole case, and though it is perfectly true that at the time when the case was heard by the Supreme Court of British Columbia the circumstances had not arisen which had occurred when the case was finally heard, yet the Supreme Court of Canada had full liberty to bring that circumstance into effect, and to give such judgment as in those circumstances they thought would do justice between the parties. Their Lordships do not think it is possible to split the judgment into two halves, as has been done. The right order, in their Lordships' opinion, will be to modify the judgment of the Supreme Court by referring the matter back to the jury to reassess the damages generally, with the condition that the Supreme Court of Canada has imposed, and as that means that the respondent has succeeded upon the appeal, they will humbly advise His Majesty to make the order that has been indicated, and to direct that the appellant should pay the costs of the proceedings. Upon the respondent's petition for special leave there should be no order except that the costs of such petition will be costs in the appeal.

Solicitors for applicant: *Charles Russell & Co.*
Solicitors for respondent: *White & Leonard.*

END OF VOL. AND OF APPELLATE SERIES FOR 1925.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1925, will be as follows:—

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[1925] 1 K. B. [1925] 2 K. B. [1925] P.

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2. —— —— *Paris Branch—Action against Customer by Paris Branch Manager in Name of Bank—Right to sue—Nationalization of Banking by Decree of Soviet Government—Effect of Decree on Branch Manager's Authority.*

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2. —— *Legislative Power—Industrial Disputes—Property and Civil Rights in the Provinces—"Peace, order, and good government of Canada"—Industrial Disputes Investigation Act*, 1907 (6 & 7 *Edw.* 7, *c.* 20, *Dom.*)—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.
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4. —— *Railway—Train crossing Highway—Statutory Requirements—"Train"—Interpretation of Statute—References to previous Legislation—Railway Act*, 1919 (9 & 10 *Geo.* 5, *c.* 68, *Dom.*), *s.* 2, *sub-s.* 34; *s.* 310, *sub-s.* 1.
Judgment of the Supreme Court [1924] S. C. R. 426 reversed. OUELLETTE *v.* CANADIAN PACIFIC RY. CO. - **J. C. 569**

5. —— (**MANITOBA**)—*Legislative Powers of Province—"Direct taxation"—Tax on Sales of Grain for future Delivery—Tax indirect in certain Cases—Stats. of Man.*, 1923, *c.* 17—*British North America Act* (30 & 31 *Vict. c.* 103), *s.* 92, *head* 2.
Judgment of the Supreme Court [1924] S. C. R. 571 affirmed. ATT.-GEN. FOR MANITOBA *v.* ATT.-GEN. FOR CANADA **J. C. 561**

6. —— —— *Provincial legislative Powers—Sunday Excursions—Lord's Day Act* (*R. S. Can.*, 1906, *c.* 153), *s.* 8—*Lord's Day* (*Amendment*) *Act* (*Stat. Man.*, 1923, *c.* 25), *s.* 1—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *head* 27; *s.* 92, *heads* 13, 16.
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7. —— (**QUEBEC**) — *Succession Duty—Situation of Property—Shares registered and transferable outside Province—"Transmission"—Quebec Succession Duty Act* (4 *Geo.* 5, *c.* 9), *arts.* 1375, 1376.
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—— (**SASKATCHEWAN**) — *Registration of Titles — Equitable Rights — Unregistered Transfer—Mortgagee without Notice of Breach of Trust—"Registered"—Documents lodged for Registration—Land Titles Act* (*R. S. Sask.*, 1920, *c.* 67), *ss.* 27, 58.
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—— *Allen* v. *Flood* - - [1898] A. C. 1
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—— *American Thread Co.* v. *Joyce* (1912) 6 Tax Cas. 1, 31.
Dictum of Buckley L.J. in, approved. SWEDISH CENTRAL RY. CO. *v.* THOMPSON - **H. L. (E.) 495**

—— *Att.-Gen.* v. *Forsikringsaktieselskabet National* (*of Copenhagen*) [1924] 1 K. B. 366.
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—— *Att.-Gen.* v. *Higgins* (1857) 2 H. & N. 339.
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—— *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [1923] 2 K. B. 682.
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—— *Barry* v. *Heider* (1914) 19 C. L. R. 197.
Approved and applied. GREAT WEST PERMANENT LOAN CO. *v.* FRIESEN - - - **J. C. 208**

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Followed. TORONTO ELECTRIC COMMISSIONERS *v.* SNIDER **J. C. 396**

—— *Bolingbroke* (*Lord*) v. *Swindon Local Board* (1874) L. R. 9 C. P. 575.
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—— *Daimler Co.* v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307.
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—— *Edwards* v. *Porter* [1923] 2 K. B. 538.
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—— *Ellis & Co.'s Trustee* v. *Dixon-Johnson* [1924] 2 Ch. 451.
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—— *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923] A. C. 605. Distinguished. TORONTO ELECTRIC COMMISSIONERS *v.* SNIDER **J. C. 396**

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—— *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* [1924] W. N. 105.
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—— *Great Southern and Western Ry. Co. of Ireland* v. *The King* [1924] 2 K. B. 450.
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—— *Griffith* v. *Williams* (1830) 1 Cr. & J. 47.
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—— *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* [1915] 1 K. B. 763.
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—— *Holland* v. *Bennett* [1902] 1 K. B. 867.
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—— *Horton & Son* v. *Walsall Assessment Committee* [1898] 2 Q. B. 237.
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—— *Mitchell* v. *Egyptian Hotels* [1915] A. C. 1022.
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—— *Moran, Galloway & Co.* v. *Uzielli* [1905] 2 K. B. 555, 562.
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—— *New Zealand Shipping Co.* v. *Thew* (1922) 8 Tax Cas. 208.
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—— *Palmer* v. *Cohen* (1831) 2 B. & Ad. 966.
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—— *Quinn* v. *Leathem* - [1901] A. C. 495
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—— *Redheugh Colliery* v. *Gateshead Assessment Committee* [1924] 1 K. B. 369.
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—— *Richmond* v. *Branson & Son* [1914] 1 Ch. 968.
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—— *Roe* v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347.
Applied. RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* COMPTOIR D'ESCOMPTE DE MULHOUSE **H. L. (E.) 112**

—— *Rogers, Sons & Co.* v. *Lambert & Co.* [1891] 1 Q. B. 318.
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—— *Rose & Frank Co.* v. *Crompton & Bros.* [1923] 2 K. B. 261.
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—— *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.*
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—— *Saxone Shoe Co.* (*France*), *Ld.* v. *Inland Revenue* 1923 S. C. 734.
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—— *Seroka* v. *Kattenburg* (1886) 17 Q. B. D. 117.
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—— *Smith* v. *Ontario and Minnesota Power Co.* (1918) 44 Ont. L. R. 43.
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—— *Sorrell* v. *Smith* - - [1924] 1 Ch. 506
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—— *Swan* v. *Sinclair* [1924] 1 Ch. 254.
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—— *Ward* v. *Laverty* [1924] 2 I. R. 19.
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—— *Watt* v. *Watt* [1905] A. C. 115.
Distinguished. WING LEE *v.* LEW **J. C. 819**

—— *Wilson* v. *Jones* (1866–7) L. R. 1 Ex. 193; L. R. 2 Ex. 139.
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—— *Wright* v. *Leonard* (1861) 11 C. B. (N. S.) 258.
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